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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1545

ANN ZIPES, PAT SANTINI and PAMELA DAILING,
INDIVIDUALLY AND ON BEHALF OF A CLASS,
Petitioners,

vs.

TRANS-WORLD AIRLINES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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No.

ANN ZIPES, PAT SANTINI and PAMELA DAILING,
INDIVIDUALLY AND ON BEHALF OF A CLASS,
Petitioners,

vs.

TRANS-WORLD AIRLINES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioners request that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit which was entered in the above cause (Docket No. 77-1325) on August 24, 1978.

OPINIONS BELOW.

The opinion of the Court of Appeals has been reported as *In re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F.2d 1142 (7th Cir. 1978). A copy appears in the Appendix (at pp. 1-17). The District Court's opinion has been reported at 17 Fair Empl. Prac. Cas. (BNA) 1512. A copy appears in the Appendix (at pp. 21-23).

JURISDICTION.

The judgment of the Court of Appeals was entered on August 24, 1978. A Petition for Modification of Opinion was filed on September 7, 1978 and was decided on January 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The case arises under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* (the "Act").

QUESTION PRESENTED.

Whether Congress intended the time-filing provision of § 706(d) of the Act to be beyond the reach of judicial doctrines of waiver and estoppel.

THE STATUTE INVOLVED.

§ 706(d) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(d) (1970) (amended 1972):*

> "A charge . . . shall be filed [with the EEOC] within ninety days after the alleged unlawful employment practice occurred . . ."

§ 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f) (1970):**

> "Each United States district court . . . shall have jurisdiction of actions brought under this title."

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* The Civil Rights Act of 1964, Title VII, §§ 701 *et seq.*, is referred to herein as "Title VII" or "the Act". Unless otherwise indicated, citations to the Act refer to the version in effect in 1970. In 1972 § 706(d) of the Act was amended and is now codified at 42 U.S.C. § 2000e-5(e) (1976); it is referred to herein as "§ 706(d)".

** Section 706(f) of the Act is presently codified at 42 U.S.C. § 2000e-5(f)(3) (1976); it is referred to herein as "§ 706(f)".

STATEMENT OF THE CASE.

During and prior to 1970, Respondent ("TWA") had a policy of terminating female flight cabin attendants ("hostesses") when they became mothers (by birth or adoption). No parenthood restrictions were imposed upon respondent's male flight cabin attendants.

On May 30, 1970, a charge was filed with the Equal Employment Opportunity Commission, challenging TWA's "no-mothers" employment practice. After the EEOC issued a right-to-sue letter under § 706(e) of the Act, the hostess' union and several individual ex-hostesses filed a timely suit in the District Court.

The Complaint was filed on August 18, 1970 on behalf of a class which was described as including all TWA hostesses who had been fired on account of parenthood after July 2, 1965 (the effective date of the Act). TWA's answer explicitly admitted that the Court had jurisdiction and made no assertion of any time-filing defense.

In 1971, TWA negotiated a settlement agreement with the union. At that time the class members were no longer members of the union. The settlement provided to the class members the right to re-employment as hostesses, but without back pay or retroactive seniority. With that settlement agreement in hand, TWA proposed (successfully) to the District Court a class definition which included all former hostesses who had been fired for parenthood since July 2, 1965. At the Rule 23, F.R.C.P. settlement hearing in March 1972, TWA's lawyer explicitly waived "any question of the statute of limitations". (App., A-28) Over the objections of petitioners and other class members, the District Court approved the settlement. TWA then presented an Order which recited "jurisdiction over the subject matter of this action and the parties hereto". During the Seventh Circuit's consideration of petitioners' appeal from the

approval of the settlement, TWA made no mention of any jurisdictional question.

The Seventh Circuit reversed. *ALSSA* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). On remand, Petitioners were appointed to replace the union as class representatives. On September 11, 1974, after more than four years of litigation, TWA first presented its defense under § 706(d) in the form of a motion for leave to amend its answer. The District Court granted TWA leave to amend on condition that TWA later prove that "the plaintiffs suffered no prejudice or that the delay in amendment was excusable." (App., A-27) TWA made no effort thereafter to satisfy the aforesaid conditions. On December 16, 1975, TWA moved to exclude from the class all hostesses who had been fired more than 90 days prior to the filing of the EEOC charges. The motion was denied and summary judgment was granted to the plaintiff class on the issue of liability, from both of which rulings TWA took interlocutory appeals to the Seventh Circuit under 28 U.S.C. § 1292(b).

The Seventh Circuit reversed the District Court's order on the scope of the class, holding that the 90 day filing requirement was "jurisdictional" and that therefore Plaintiffs' arguments regarding estoppel and waiver could not be considered. Accordingly, the Court of Appeals restricted class membership to those persons whose terminations occurred within 90 days prior to the filing of the EEOC charge and excluded all of the other members (including Petitioners) of the class which was certified in the District Court.

REASONS FOR GRANTING THE WRIT.

I.

This Issue Has Previously Been Reviewed, But Was Not Decided, by This Court.

The issue involved here is almost identical to the issue concerning which this Court granted certiorari on February 22, 1977. *Shell Oil Company* v. *Dartt*, 429 U.S. 1089 (1977).

In *Dartt*, the plaintiff had argued in the Tenth Circuit that the employer was estopped to assert the time-filing defense under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.* (1976). *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256, 1258-1259 (10th Cir 1976). The Tenth Circuit viewed the time-filing requirements under ADEA and Title VII as being analogous* and therefore drew upon Title VII precedents in determining whether equitable modification was available to plaintiff. 539 F.2d at 1259-1260. The Tenth Circuit Court of Appeals interpreted the 180 day filing requirement as being subject to tolling and estoppel. 539 F.2d at 1256, 1260-1261. Because of an equally divided court, this Court affirmed without deciding the question. *Shell Oil Company* v. *Dartt*, 434 U.S. 99 (1977) (*per curiam*).

II.

There Is a Conflict in the Circuits.

The Question Presented has been decided by four Ciruit Courts of Appeals. In *Reeb* v. *Economic Opportunity Atlanta,*

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* The relevant provision under the ADEA stated:

"No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred. . . ." 29 U.S.C. § 626(d)(1) (1976).

Inc., 516 F.2d 924, 928 (5th Cir. 1975) and *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976), *cert. denied* 434 U.S. 1086 (1978), the Courts of Appeals for the Fifth and District of Columbia Circuits ruled that the § 706(d) requirement is a "statute of limitations" rather than a "jurisdictional prerequisite", and that therefore the courts are not bound to turn deaf ears to claims of estoppel, waiver and tolling. The Eighth Circuit, in *Hinton* v. *CPC International, Inc.*, 520 F.2d 1312, 1315 (8th Cir. 1975), and the Seventh Circuit, in the case *sub judice*, have ruled contra to the Fifth and D. C. Circuits.

The Second Circuit regards the question as being "still open". *Egelston* v. *State University College*, 535 F.2d 752, 755 n.5 (2nd Cir. 1976); *Smith* v. *American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978).

In cases arising under the ADEA, the Seventh Circuit itself, along with the Third and Tenth Circuits, has ruled that the time-filing requirement is subject to traditional equitable modifications. *Kephart* v. *Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978); *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977), *cert. denied*, 99 S.Ct. 87 (1978). The Sixth Circuit indicated to the contrary in *Ott* v. *Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975), although in *Gabriele* v. *Chrysler Corp.*, 573 F.2d 949 (6th Cir. 1978), *petition for cert. filed*, 47 USLW 3015 (U.S. July 25, 1978) (No. 78-1), the Sixth Circuit stated that the "jurisdictional" statement in *Ott, supra*, had been used "in the loose sense" and was dictum. 573 F.2d at 954 n.15.

III.

The Time-Filing Provision of Section 706(d) Reflects No Congressional Intention to Deem Compliance as a Condition of Subject Matter Jurisdiction.

Subject matter jurisdiction is nothing less than the power of the court to hear the matter. *Cooper* v. *Reynolds*, 77 U.S. (10 Wall.) 308, 316 (1870); *West Coast Exploration Co.* v. *McKay*, 213 F.2d 582, 591-592 (D.C. Cir.), *cert. denied*, 347 U.S. 989 (1954); *Noxon Chemical Products Co.* v. *Leckie*, 39 F.2d 318, 320 (3d Cir.), *cert. denied*, 282 U.S. 841 (1930). But subject matter jurisdiction depends only on the *nature* of the case; if the case arises out of the laws of the United States, federal courts have jurisdiction. *Cohens* v. *Virginia*, 19 U.S. 90, 6 Wheat. 264 (1821). Section 706(f) of the Act states that the district courts "shall have jurisdiction of actions brought under this title."

Statutes which create new rights of action are sometimes interpreted to mean that the time-filing provisions contained therein must be obeyed lest the newly created right of action be extinguished, as compared with ordinary statutes of limitations which merely bar the *remedy*. Whether a limitations provision should be so construed is always a matter of determining Congress' intention. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 556-559 (1974); *Burnett* v. *New York Central R.R.*, 380 U.S. 424, 427 n.2 (1965).

In *Guy* v. *Robbins & Myers, Inc.*, 525 F.2d 124 (6th Cir. 1975), the time allowed under § 706(d) expired prior to the filing of plaintiff's EEOC claim. Thereafter, Congress amended the Act to lengthen the filing period to 180 days; plaintiff then filed her EEOC charge prior to the 180th day. The Sixth Circuit Court of Appeals held, *inter alia*, as follows:

> "The limitation in Title VII is more than a mere statute of limitations. The Act creates a right and liability which did not exist at common law and prescribes the remedy. The

> remedy is an integral part of the right and its requirements must be strictly followed. If they are not, the right ends." 525 F.2d at 127.

This Court reversed on this point. *Electrical Workers Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976). Had this court viewed § 706(d) as setting a condition of the right such that failure to comply therewith would extinguish the right of action, it would have held unconstitutional a Congressional attempt to revive a right of action which had already been extinguished; instead, this Court explicitly rejected that notion.*

Furthermore, if § 706(d) laid down a "precondition to the right" or was truly jurisdictional in the subject matter sense, *nothing* would cause its command to succumb. Yet, compliance with § 706(d) by one aggrieved victim undisputably obviates the necessity for any other victim to file an EEOC charge. See *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385, 97 S.Ct. 2464, 2467 n.6 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772 (1976); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 n.8 (1975).

Absent any legislative history to indicate to the contrary, a statutory time-filing requirement will be read in light of the deeply rooted principle that equity and fairness will sometimes require tolling or other modification. *Glus* v. *Brooklyn Eastern Dist. Teminal*, 359 U.S. 231 (1959). Thus, in cases arising under the World War Veterans Act, 38 U.S.C. § 445 (1952), the time-filing defense has consistently been modified by the doctrines of waiver and estoppel. See, e.g., *United States* v. *Ellison*, 74 F.2d 864, 869 (4th Cir.), *cert. den.*, 295 U.S. 750 (1935). Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(b) (1976), which is the administrative filing provision, has consistently been construed as a statute of limitations which may be waived unless timely

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* This precise issue was squarely before the Court. See Brief for the Respondent, pp. 17-18, and transcript of the oral arguments, pp. 33-40, *Electrical Workers Local 790* v. *Robbins & Myers, Inc.*, Supreme Court Doc. Nos. 75-1264 and 75-1276.

asserted. *A. H. Belo Corp.* v. *NLRB*, 411 F.2d 959, 967 (5th Cir. 1969), *cert. den.*, 396 U.S. 1007 (1970).*

The Seventh Circuit based its "jurisdictional" decision on the absence of Congress' expressed intention to the contrary. (App., A-15) The inquiry should be the other way around, viz: Is there anything which shows that Congress intended that § 706 (d) should *not* be subjected to the traditional judicial doctrines of waiver and estoppel?

IV.

The Doctrines of Waiver and Estoppel Are Appropriate to This Case.

A. TWA Should Be Estopped from Asserting the § 706(d) Defense.

With a costless settlement in hand, TWA, seeking to bind the entire post-1965 class, proposed an Order which confirmed the District Court's jurisdiction over all of the class members. Only after the Seventh Circuit overturned the settlement, and the strategy** of quieting all claims for all time became a failure, did TWA play its trump card under § 706(d).

A litigant should not be allowed to use jurisdictional arguments to play fast and loose with the courts. *Alger* v. *Hayes*, 452 F.2d 841 (8th Cir. 1972); *Di Frischia* v. *New York Central R.R.*, 279 F.2d 141, 144 (3d Cir. 1960); *Scarano* v. *Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953).

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* The significance of § 10(b) of the NLRA as being subject to waiver is two-fold: (1) Title VII's statutory scheme was patterned after the NLRA. *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 n.11 (1975); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768-770 (1976); and (2) § 10(b) of NLRA is even more stringently worded than § 706(d) of Title VII. The NLRA provision states:

> "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . ." 29 U.S.C. § 160(b) (1976).

** One of the grounds for reversal was the deprivation of the class members' opt-out privileges under Rule 23(c)(2), F.R.C.P. *ALSSA* v. *American Airlines, Inc.*, 490 F.2d 636, 642-643 (7th Cir. 1973), *cert. denied* 416 U.S. 993 (1974).

B. TWA Waived the § 706(d) Defense.

Rule 8(c), F.R.C.P. requires that:

> ". . . a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense."

Even the defense of lack of jurisdiction must either be asserted in the responsive pleading or by motion "made before pleading. . . ." Rule 12(b), F.R.C.P. TWA's failure timely to plead the defense, its explicit open-court waiver in 1972 and its failure to satisfy the District Court's conditions subsequent in granting TWA leave to amend its Answer in 1974, waived TWA's right to assert the § 706(d) defense. Time-filing restrictions confer technical defenses, the purpose of which is to avoid stale claims.* That policy logically applied to TWA's stale *defense*, as well.

Even assuming, *arguendo*, that the Seventh Circuit was correct to the extent that § 706(d) establishes a precondition to a Title VII victim's right of action, the Seventh Circuit went too far in characterizing compliance with § 706(d) as affecting subject matter jurisdiction. The affirmative defense under § 706(d) should have been deemed waived and TWA should have been estopped to assert it. At a minimum, this case should have been remanded to the District Court for determination of the factual issues involved in the waiver and estoppel issues.

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* Senator Case, one of the floor managers in the Senate of the House Bill, H.R. 7152, stated that the six-month limit on filing with the Commission contained in that bill was "to avoid the pressing of 'stale' claims." 110 Cong. Rec. 7243 (1964). Senator Humphrey, commenting on the differences between H.R. 7152 and the substitute Senate bill, S. 656, which was eventually passed by the Senate, referred to its 90-day time period as a "period of limitations." *Id.* at 12723.

CONCLUSION.

For the reasons stated herein, a writ of certiorari should issue to the Seventh Circuit Court of Appeals and the judgment should be reversed and this cause should be remanded with instructions to:

(a) affirm the District Court's denial of Respondent's motion to exclude [certain class members] from the class, or, in the alternative,

(b) remand this cause to the District Court for determination of the factual issues involved in Petitioners' claims of waiver and estoppel.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 77-1325

In re:

CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES.

Appeal of:

AMERICAN AIRLINES, INC., and TRANS WORLD AIRLINES, INC.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 70 C 2069, 70 C 2071, 72 C 498, 74 C 2063 and 74 C 2762—Frank J. McGarr, *Judge.*

Argued January 26, 1978—Decided August 24, 1978.

Before FAIRCHILD, *Chief Circuit Judge,* PELL and SPRECHER,* *Circuit Judges.*

PELL, *Circuit Judge.* This is an interlocutory appeal under 28 U. S. C. § 1292(b) of two district court orders. Pretrial proceedings in the district court involved consolidated Title VII[1] class action suits by female flight cabin attendants against American Airlines, Inc. and Trans World Airlines, Inc. (TWA).

* Although Judge Sprecher heard oral argument, he later disqualified himself from any participation in the decision, and preparation of the opinion, in this case.

1. Title VII, Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*

Subsequent to the filing of this appeal, American entered into a settlement agreement which was challenged and approved on appeal. *Airline Stewards and Stewardesses Association, Local 550* v. *American Airlines, Inc.*, No. 77-2098 (7th Cir. Mar. 14, 1978).

The October 18, 1976 Order

TWA thus remains as the only appellant and appeals from the district court's summary judgment order of October 18, 1976, which held TWA's "motherhood" restrictions prior to October 1970 to be a violation of § 703(a) of the Civil Rights Act, 42 U. S. C. § 2000e-2(a).[2] Specifically, TWA maintained a policy of removing female flight cabin attendants from flight duty while pregnant, and thereafter if a child was born. This policy also extended to female flight cabin attendants who adopted a child. These employees who became mothers either by childbirth or by adoption were terminated permanently unless they were willing to accept employment in ground duty positions. This policy, however, did not apply to their male counterparts. Male cabin attendants, designated "pursers" by TWA, could remain on flight duty after becoming a parent. Although pursers served on international flights, their responsibilities were

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2. This section provides:

> It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U. S. C. § 2000e-2(a).

substantially the same as those of female flight cabin attendants.[3]

TWA challenges the summary judgment on the grounds that: (1) its policy was not gender-based and therefore did not constitute sex discrimination: (2) its policy did not have a discriminatory effect; and (3) if the policy did discriminate on the basis of sex, the discrimination was a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of TWA's business.[4]

To clarify the challenged portion of TWA's policy, the plaintiff class does not challenge that aspect of TWA's policy which removed female flight cabin attendants from flight duty when they became pregnant. Furthermore, the district court's order, by reference to an earlier order involving American Airlines, specifically stated that this aspect of the policy was not discriminatory. *See Condit* v. *United Air Lines*, 558 F. 2d 1177 (4th Cir. 1977), *cert. denied*, 46 U. S. L. W. 3581 (Mar. 21, 1978). At issue then is only the policy of requiring female cabin attendants who become mothers to resign or accept ground duty positions while not imposing similar restrictions on their male counterparts who become fathers.

In arguing that its policy was not gender-based, TWA relies on *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976), in which the Supreme Court held that General Electric's disability benefit plan did not violate Title VII even though it failed to cover pregnancy-related disabilities. To draw support for its argument from *Gilbert*, TWA appears to focus on the maternity

3. *See Laffey* v. *Northwest Airlines, Inc.*, 567 F. 2d 429, 439-42 (D. C. Cir. 1976), *cert. denied*, 46 U. S. L. W. 3527 (Feb. 21, 1978).

4. 42 U. S. C. § 2000e-2(e) provides in pertinent part:

> [i]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

leave aspect of its policy and to minimize addressing the only portion of the policy that is at issue, the no-motherhood restriction. *Gilbert* clearly provides no support for the proposition that TWA's no-motherhood policy withstands Title VII scrutiny.

TWA's no-motherhood policy in our opinion provides a clear example of sex discrimination prohibited by § 2000e-2(a). The Supreme Court, in applying that provision, has held that an employer may not refuse to hire women with pre-school-age children while hiring men with such children. *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971). TWA's policy discriminated in the same manner.

TWA next argues that its policy did not have a discriminatory effect. This argument is irrelevant. In Title VII cases, discriminatory effect becomes an issue when the employer has a facially neutral practice. In those cases, the plaintiffs can establish a prima facie case by proving that the practice has a discriminatory effect. *See Dothard* v. *Rawlinson*, 433 U. S. 321, 329 (1977). We need not reach that issue in the present case because TWA's policy was discriminatory on its face.

Finally, TWA argues that if its policy did discriminate on the basis of sex, the discrimination was a BFOQ reasonably necessary to the normal operation of TWA's business. The BFOQ, often described as an exception to Title VII's general prohibition of sex discrimination, is, at least in the view of one commentator, more accurately designated as a justification for sex discrimination.[5] TWA argues that its no-motherhood policy, albeit discriminatory, was justified as a BFOQ because (1) mothers of young children would have unacceptably high rates of absenteeism, (2) mothers might be subject to overriding domestic concerns that would make them questionable risks for competent performance in times of crisis, and (3) mothers

5. For a thorough discussion of the legislative history and the current judicial interpretations of the BFOQ, see Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 Tex.L. Rev. 1025, 1027-33, 1042-50 (1977).

returning from maternity leaves of absence would require expensive retraining.

Our analysis of the BFOQ issue must begin with the Supreme Court's most recent pronouncement in *Dothard* v. *Rawlinson, supra* at 334.

> We are persuaded—by the restrictive language of § 703(e) [§ 2000e-2(e)], the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.

The Court, in a footnote, also stated that the EEOC's narrow construction of the statute, 29 C.F.R. § 1604.2(a), can be given weight. 433 U. S. at 334 n. 19. The lower court interpretations of the BFOQ prior to *Dothard* are not entirely consistent.[6] In view of the Supreme Court's recent approbation of "an extremely narrow" construction, we are of the opinion that the Ninth Circuit's construction is the most appropriate. In *Rosenfeld* v. *Southern Pacific Co.* 444 F. 2d 1219 (9th Cir. 1971), that court stated that

> based on the legislative intent and on the Commission's interpretation, sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception.

444 F. 2d at 1225. Thus, attributes that are culturally more common to one sex than the other are an insufficient basis for a BFOQ. Cultural stereotypes should not be employed to justify sex discrimination.

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6. *Compare Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F. 2d 228 (5th Cir. 1969), *with Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (5th Cir.), *cert. denied*, 404 U. S. 950 (1971). *See also Usery* v. *Tamiami Trail Tours Inc.*, 531 F. 2d 224 (5th Cir. 1976). A perceptive analysis of these cases, as well as a comprehensive survey of developments in Title VII jurisprudence, is provided in Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. Ill. L. F. 69.

With this background, we now turn to the three issues which TWA argues present genuine issues of material fact on the BFOQ issue sufficient to defeat summary judgment. First, TWA argues that mothers, but not fathers, of young children would have an unacceptably high rate of absenteeism. They submit that absenteeism is a serious problem among flight attendants. This alone, of course, does not address the critical issue of whether female parents have a sexual characteristic different than male parents which would cause them to be absent more often. TWA, in an attempt to raise a genuine issue of material fact, points to the deposition of David J. Crombie, Vice-President of Industrial Relations at TWA, which states that problems of absenteeism have been exacerbated since TWA permitted mothers on flight duty. This is insufficient to defeat summary judgment because he does not attribute the increased absenteeism problem directly to the mothers. Indeed, he presents no evidence nor even states that mothers were absent more often than fathers, information, if it exists, that surely would be available to him.[7] TWA, in its brief, can only state that "[t]he airlines *could not be sure* that absenteeism among flight attendants with young babies would not increase greatly." [Emphasis added.] The whole tenor of its argument is speculative and relies heavily on stereotypical assumptions, a posture which is anathema to the maturing state of Title VII analysis.

TWA next argues that it raised a genuine issue of material fact as to a BFOQ in its allegation that mothers might be subject to overriding domestic concerns that would make them questionable risks for competent performance in times of crisis. In support of this allegation TWA primarily offers affidavits of Dr. L. G. Lederer, Corporate Medical Director of

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7. TWA terminated its no-motherhood policy in October 1970 and thus has had several years to assess the absenteeism problem of mothers *vis-a-vis* fathers, if such a problem exists, and to determine whether it is linked to a sex characteristic.

American Airlines, Dr. Charles C. Gullett, Corporate Director Medical Services & Safety Engineering for TWA, and the deposition of David J. Crombie.

Dr. Lederer's affidavit states that a mother's concern for her child, when combined with irregular hours and absences from home at distant locations, would produce psychological stresses which could impair the proper performance of her flight duties. This is insufficient to defeat summary judgment because he fails to contrast the potential effect on performance with that of fathers, the critical issue in this case. Indeed, within the same paragraph, Dr. Lederer states that frequent absences from home and irregular work hours as experienced by *firemen* and *salesmen* contributed to unstable marriages. Therefore, it is not at all clear that his conclusions regarding effects on performance are gender-related.

Dr. Gullett's affidavit includes statements similar to those of Dr. Lederer and accordingly fails to defeat summary judgment for the same reasons. Mr. Crombie's deposition similarly fails to raise a genuine issue of material fact. He stated in a conclusory fashion that "the mother of children *could* be so preoccupied with her cares that she *might* be deficient in the performance of those aspects of her job relating to safe transport. . . ." [Emphasis added.] Aside from our uncertainty as to Mr. Crombie's expertise to make such a judgment, we are not persuaded that his conclusions are not based on sex stereotyping that Title VII seeks to eliminate from the employment setting. As this court stated in *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U. S. 991 (1971), § 703(a)(1) "subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past." Furthermore, Mr. Crombie's statements do not address the question of whether mothers have a sex characteristic, different than fathers, that would impair their job performance to a greater extent. Characteristics that might, to one degree or another, correlate with a particular sex

are insufficient to provide the basis for a BFOQ. *Rosenfeld* v. *Southern Pacific Co., supra* at 1225. To accept Mr. Crombie's statements as sufficient to raise a genuine issue of material fact requires acquiescence in assumptions steeped in cultural stereotypes, such as that female parents have a more intense concern for their children than male parents, assumptions that are inconsistent with the purposes of the Act.

TWA's third argument to defeat summary judgment is that it raised an issue of fact as to the existence of a BFOQ by its allegation that mothers returning from maternity leaves would require expensive retraining. We are unpersuaded by this argument because it seems clear that retraining a mother returning from maternity leave, albeit an expense to TWA, would be less expensive than training her replacement.

We have examined all the other relevant affidavits, depositions, and documents in the record and find them of no additional support to TWA's challenge to the district court's summary judgment. Accordingly, for the reasons stated herein, we hold that the district court properly granted summary judgment in favor of the plaintiffs.[8]

The October 15, 1976 Order

TWA moved to exclude certain persons from the plaintiff class for lack of subject matter jurisdiction. The class was defined as all female flight cabin attendants who were terminated

8. Our decision to affirm the summary judgment here may appear inconsistent with language in *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 544 (1971), where the Court, in vacating and remanding a sex discrimination case stated that "conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act." This language, however, does not categorically state that such considerations, if proved, would constitute a BFOQ. Indeed, after *Dothard* v. *Rawlinson*, 433 U. S. 321, 334 (1977), in which the Court accepted an "extremely narrow" construction of the BFOQ, the court may well be unwilling to accept such considerations as sufficient to constitute a BFOQ. Furthermore, in *Phillips*, the defendant did not raise the BFOQ defense in the lower court and thus the issue was not directly before the Supreme Court.

from employment with TWA on or after July 2, 1965 for reasons of pregnancy.[9] TWA's motion sought to exclude from this class all those employees who were terminated more than 90 days prior to May 31, 1970, the date the original plaintiff class filed its charge with the EEOC. TWA argues that these employees did not fulfill the jurisdictional requirement that a charge must be filed with the EEOC within 90 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(d) (1970 ed.).[10]

The district court denied TWA's motion on the ground that the alleged unlawful employment practice was a "continuing violation" so that even though the termination may have occurred more than 90 days before the plaintiff class filed its charge with the EEOC, the no-motherhood policy, which caused not only termination, but also the failure to reinstate, continued into the 90-day period and itself constituted an unlawful employment practice which continued until TWA abandoned the policy in October 1970.

The continuing violation theory was created to add some flexibility to an otherwise rigid jurisdictional filing requirement that might often result in the denial of Title VII remedies to employees who have suffered employment discrimination. Although the purpose of the theory is admirable, an application of the theory in its broadest terms would vitiate the filing requirement which, as a jurisdictional prerequisite, also deserves proper respect. Accordingly, we must define the legitimate scope of this theory and determine whether TWA's conduct falls within it.

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9. Since the pregnancy leave policy is not challenged, but rather the refusal to reinstate after a child is born, we assume the class includes only those who would have resumed flight duty after becoming a mother but for TWA's policy forbidding this.

10. In 1972, this section was amended to extend the time limit to 180 days and was renumbered § 2000e-5(e). The amendment does not apply to the present case because these proceedings were initiated in 1970.

Courts which have applied the continuing violation theory have not addressed the precise issue in the present case. In *Cox* v. *United States Gypsum*, 409 F. 2d 289 (7th Cir. 1969), several female employees were laid off more than 90 days prior to filing charges with the EEOC. They claimed a continuing violation on the basis that male personnel were hired to perform jobs which the plaintiffs were qualified to perform between the time plaintiffs were laid off and the time they filed their charges. This court held that although a charge filed more than 90 days after a layoff would be untimely, the plaintiffs' allegations suggested discriminatory recalls sufficient to show that the violation continued up to the filing of charges. 409 F. 2d at 290. *Accord, Macklin* v. *Spector Freight Systems*, 478 F. 2d 979 (D. C. Cir. 1973). *See also Bartmess* v. *Drewrys U. S. A., Inc.*, 444 F. 2d 1186, 1189 (7th Cir. 1971), *cert. denied*, 404 U. S. 939.

When the alleged unfair employment practice culminates in termination of employment rather than a layoff, courts have been unwilling to apply the continuing violation theory. In *Terry* v. *Bridgeport Brass Co.*, 519 F. 2d 806 (7th Cir. 1975), the plaintiffs filed their EEOC charge more than eleven months after they were terminated. This court, quoting an opinion of the Eighth Circuit, stated that

> to construe loosely "continuing" discrimination would undermine the theory underlying the statute of limitations. While the continuing discrimination theory may be available to present employees, . . . even though on layoff, . . . we do not think this theory has validity when asserted by a former employee.

519 F. 2d at 808. For this reason the court held that the EEOC charges were untimely filed and that the court consequently lacked jurisdiction.

The present case is distinguishable from *Cox* because it does not involve layoffs and from *Terry* because *Terry* did not involve the continuation of an articulated policy denying rein-

statement for discriminatory reasons.[11] It is also distinguishable from the Supreme Court's recent opinion in *United Air Lines* v. *Evans*, 431 U. S. 553 (1977). In *Evans*, the plaintiff was terminated in 1968 because of United's no-marriage rule. United discontinued the rule in 1969 and the plaintiff was hired as a new employee in 1972. In 1973, she filed charges with the EEOC and argued that her employment in 1972 without seniority continued the discriminatory effects of the original termination. The Court responded that the hiring practices in 1972 were not discriminatory and that these hiring practices merely gave some present effect to past discrimination. Such "present effect" is not enough to state a claim under Title VII, however, and the Court stated that "the critical question is whether any present *violation* exists." 431 U. S. at 558 (emphasis in original). Whether any present violation would have existed had the plaintiff filed while the no-marriage policy was still effective or within 90 days of its discontinuation, was not decided and, in essence, is the issue before us now.[12]

Although, as we have indicated, there are no cases directly on point, we are unwilling to extend the continuing violation theory, as did the district court, so as to include in the plaintiff class those employees who were permanently terminated more than 90 days before the filing of EEOC charges. We attach sig-

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11. This latter question of whether the continuation of a discriminatory policy which denies reinstatement constitutes a continuing violation was specifically left open by the Ninth Circuit. In *Collins* v. *United Air Lines, Inc.*, 514 F. 2d 594 (9th Cir. 1975), the plaintiff was forced to resign under a "no-marriage" policy. The policy was then changed and three years later the plaintiff filed a charge with the EEOC. The court held the filing untimely, but specifically stated that it expressed no opinion concerning whether a charge filed within 90 days of the discontinuance of the no-marriage policy would have been timely. 514 F. 2d at 596 n. 2.

12. Neither the EEOC nor the courts have construed *Evans* as eliminating entirely the continuing violation theory. *See* EEOC Interpretative Memorandum, 46 U. S. L. W. 2028 (July 19, 1977); *Caldwell* v. *Seaboard Coastline Railroad*, 435 F. Supp. 310 (W. D. N. C. 1977).

nificant weight to that point in time when the employment relationship is permanently severed, and we are not alone in this regard. In *Laffey* v. *Northwest Airlines, Inc.*, 567 F. 2d 429 (D. C. Cir. 1976), the court stated in a similar Title VII class action context that

> [a] severing of the employment relationship ordinarily terminates a discrimination against the severed employee, and activates the time period for filing charges with the Commission concerning any violation which occurred at separation or which may have been continuing up to the date thereof. To hold otherwise would effectively read the timely-filing requirement out of the statute.

567 F. 2d at 473. *Accord, Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 246 (3d Cir.), *cert. denied*, 421 U. S. 1011 (1975); *Terry* v. *Bridgeport Brass Co.*, *supra* at 808; *Collins* v. *United Air Lines, Inc.*, 514 F. 2d 594, 596-97 (9th Cir. 1975). Arguably, the source for the continuing violation is not the termination itself, but the subsequent refusal to reinstate because of the same policy that led to the initial termination. We are of the opinion, however, that the terminations in the present case, which occurred pursuant to a policy which explicitly included a refusal to reinstate, are not meaningfully different than discriminatory terminations which do not articulate a policy of refusing reinstatement. In most cases in which an employee is discharged for discriminatory reasons, his or her opportunity for reinstatement is generally foreclosed for the same discriminatory reasons, but courts have required that employee to file an EEOC charge within 90 days after the termination. The addition of an articulated policy precluding reinstatement should not require a different rule. Therefore, it is the continuity of the employment relationship that sustains the violation, and when that relationship is severed, the violation ceases.

Those employees in the present case who were terminated but reinstated in ground duty positions after their maternity leave pursuant to TWA's policy, are in a different position. These

employees were properly included in the class because they were subject to a continuing violation. When they resumed employment after becoming a mother, the discriminatory violation, which lay dormant during their pregnancy, was revived; that they were forced to accept a presumably less preferable ground duty position while new employees were hired for flight duty revived the violation and rendered it as to them a continuing one. The position of these employees is closely analogous to the layoffs followed by discriminatory recalls held to be continuing violations in *Cox* and *Macklin*, both *supra*. It is also analogous to a discriminatory failure to promote, held to be a continuing violation in *Clark* v. *Olinkraft, Inc.*, 556 F. 2d 1219, 1223 (5th Cir. 1977), *cert. denied*, 46 U. S. L. W. 3527 (Feb. 21, 1978). *See also Caldwell* v. *Seaboard Coastline Railroad*, 435 F. Supp. 310 (W. D. N. C. 1977). Every time TWA hired a new flight cabin attendant, instead of transferring one of the former stewardesses now on ground duty, it perpetuated the initial violation.

The distinction we have drawn between those terminated employees who returned to employment in ground duty positions and those who did not renew the employment relationship is a delicate but nonetheless important one. The returning employee remains within the ambiance of a continuing relationship of employment and supervision and thus is directly subject to the employer's discriminatory actions. The non-returning employee is outside this ambiance and thus feels at most only the indirect reverberations of those actions. Although the non-returning employee who did not desire to remain as a TWA employee in a non-flight position may arguably suffer some form of discrimination whenever the employer hires a new flight cabin attendant instead of reinstating the terminated employee, the discriminatory impact is diffuse and uncertain. Permanent severance of the employment relationship destroys the ties through which the direct impact of discrimination may be transmitted.

TWA points out with some cogency the inherent difficulties of determining back pay if all members of the class were found entitled to prove what TWA characterizes as "these stale claims": each claim will require adjudication of whether termination was for any reason other than discrimination; a claimant may not recover if she was guilty of concealment of pregnancy; she may not recover if she left work for family reasons; amounts earned or earnable with reasonable diligency by each claimant in other work during recoverable years must be determined in order to reduce back pay under the express provisions of § 706(g); and the evidence concerning the individual and personal facts of hundreds of these claims is sure to be vague and unreliable.

While all of these aspects may be true, we do not deem that difficulty of ascertainment per se is a ground for denying relief where it is legally due. Nevertheless, we cannot put this factor entirely aside in determining the Congressional intent in requiring claims to be litigated only if filed with the EEOC within 90 days after the alleged unlawful employment practice occurred.

We hold therefore that the class members who satisfy the jurisdictional 90 day filing requirement are those employees who were terminated permanently[13] during the 90 days prior to the filing of EEOC charges and those employees who were removed from flight duty on or after July 2, 1965 and before the filing of EEOC charges but who were reinstated in ground duty positions and who continued their employment into the 90-day period. While we might rather safely assume that those employees who returned to work in a ground capacity would have preferred to reassume the literally and figuratively higher status of cabin attendants, nevertheless it is not a necessarily true

13. The proper time for the 90-day period to begin to run is the time of *permanent* termination. Although TWA argues otherwise, we interpret the effect of its policy as resulting in permanent termination when a child was born or adopted. Prior to that time the severance from employment was in actuality a mandatory maternity leave. This is apparent from the fact that a pregnant employee was free to resume employment in flight duty after a miscarriage or in ground duty after childbirth.

conclusion and therefore these employees must also show that during the 90-day period they were qualified to and would have accepted flight duty had it not been for TWA's policy.

As to those employees who have failed to file timely charges with the EEOC, who were terminated more than 90 days before filing of EEOC charges and who did not resume employment in ground duty positions, we must now consider whether the employer waived this timeliness defense by failing to plead it affirmatively in its answer. There is no dispute that the employer failed to raise this issue in the pleadings. The critical issue is whether the 90-day period is in the nature of a statute of limitations in which case the doctrines of waiver and estoppel would apply, or is a jurisdictional prerequisite to suit in which case the employer could raise it at any time.[14] We hold the 90-day filing period to be jurisdictional and therefore the employer's failure to plead it did not constitute a waiver.

The language of the statute is clear:

> A charge under subsection (a) of this section *shall be filed* within ninety days after the alleged unlawful employment practice occurred.

42 U. S. C § 2000e-5(d) (1970 ed.) (emphasis added).[15] Furthermore, having examined the legislative history of this provision, of which there is very little, we find nothing of significance to indicate that the 90-day filing requirement is not jurisdictional. *But cf. Laffey* v. *Northwest Airlines, Inc.*, 567 F. 2d 429, 475 n. 345 (D. C. Cir. 1976). In *Terry* v. *Bridgeport Brass Co., supra,* the plaintiffs' Title VII suit was dismissed in the district court because they failed to file charges with the EEOC within 90 days of the alleged unfair employment practice. On appeal, this court affirmed the dismissal stating that "[t]he district court therefore correctly concluded that the charges were untimely filed and that it consequently lacked juris-

14. Fed. R. Civ. P. 12(h)(3); *United States* v. *Griffin*, 303 U. S. 226, 229 (1938).

15. *See* note 10 *supra.*

diction." 519 F. 2d at 808.[16] Moreover, the Supreme Court has, on several occasions, referred to the 90-day filing requirement as a jurisdictional prerequisite. *See United Air Lines, Inc.* v. *Evans, supra* at 555 n.4; *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 47 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973). Therefore, the employer's failure to raise the filing requirement earlier does not constitute a waiver, nor is the employer estopped from raising it.

The plaintiffs argue that the employer's statements at a March 17, 1972 settlement hearing constitute an express waiver of the filing requirement issue. Although it is questionable whether any concessions made at a settlement hearing should be held to constitute a waiver when the settlement is subsequently overturned, we need not reach this question as our conclusion that this filing requirement was jurisdictional precludes a finding of waiver.

Plaintiffs also argue that the employer should be estopped from raising the filing requirement because the employer failed to raise it during the many lengthy proceedings which preceded the employer's motion to amend its answer to raise the issue. Plaintiffs characterize this conduct as "playing fast and loose

16. *See also Gibson* v. *Kroger Co.*, 506 F. 2d 647, 650 (7th Cir. 1974), *cert. denied*, 421 U. S. 914 (1975); *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811, 821 n. 6 (7th Cir. 1972); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 718 (7th Cir. 1969); *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357, 359 (7th Cir. 1968).

Other circuits are split on this issue. *See, e.g., Laffey* v. *Northwest Airlines, Inc.*, 567 F. 2d 429, 475 (D. C. Cir. 1976); *Dartt* v. *Shell Oil Co.*, 539 F. 2d 1256 (10th Cir. 1976), *aff'd per curiam by an equally divided Court*, 46 U. S. L. W. 4021 (Nov. 29, 1977); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 246 n. 8 (3d Cir.), *cert. denied*, 421 U. S. 1011 (1975); *East* v. *Romine, Inc.*, 518 F. 2d 332, 336-37 (5th Cir. 1975); *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924, 928-29 (5th Cir. 1975); *Olson* v. *Rembrandt*, 511 F. 2d 1228, 1231 (8th Cir. 1975).

Olson was the 8th Circuit case quoted in *Terry*. We have earlier in this opinion quoted from *Terry* in connection with the discussion of the continuing violation issue. We note that the 8th Circuit did refer to "the statute of limitations" in the *Olson* opinion. *Terry*, however, clearly proceeded on the basis of jurisdiction.

with the courts," and contend that such conduct is grounds for estoppel. We do not condone the employer's delay in raising the jurisdiction issue, but neither do we accept the plaintiffs' argument that the delay should estop TWA from raising subject matter jurisdiction. The cases plaintiffs cited in support of their estoppel theory either did not involve subject matter jurisdiction, *Alger* v. *Hayes*, 452 F. 2d 841 (8th Cir. 1971), or involved a situation in which the defendant pleaded lack of jurisdiction in its answer, then filed a stipulation admitting jurisdiction, and then two years later, after the statute of limitations had run on the plaintiff's claim, attempted to raise the same jurisdiction issue it initially pleaded. *DiFrischia* v. *New York Central Railroad Co.*, 279 F. 2d 141 (2d Cir. 1960).[17] None of these cases, therefore, supports an estoppel argument in the present case.

Accordingly, for the reasons stated herein, we vacate the October 15, 1976 order and remand to the district court for further proceedings consistent with this opinion. The parties shall bear their respective costs.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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17. This case has been limited in its application to its unusual facts. *See, e.g., Joyce* v. *United States*, 474 F. 2d 215, 218 n.1 (3d Cir. 1973).

OPINION BY JUDGE PELL

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 24, 1978.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge**

In Re: CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES, No. 77-1325 Appeal of: AMERICAN AIRLINES, INC., and TRANS WORLD AIRLINES, INC.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 70-C-2069, 70-C-2071, 72-C-498, 74-C-2063, 74-C-2762. Frank J. McGarr, *Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the district court properly granted summary judgment in favor of the plaintiffs; and the order of October 15, 1976 is VACATED and REMANDED, in accordance with the opinion of this court filed this date. Each party shall bear its respective costs.

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* Although Judge Sprecher heard oral argument, he later disqualified himself from any participation in the decision, and preparation of the opinion, in this case.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 11, 1979.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

In Re: CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES, No. 77-1325 Appeal of: AMERICAN AIRLINES, INC., and TRANS WORLD AIRLINES, INC.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 70-C-2069, 70-C-2071, 72-C-498, 74-C-2063, 74-C-2762. Frank J. McGarr, *Judge.*

On consideration of the petition for rehearing filed in the above cause by defendant-appellant, Trans World Airlines, Inc., all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

The petitioners, Anne B. Zipes, et al., have petitioned for modification of the opinion to state that the class includes those female cabin attendants who were terminated after May 31, 1970, the conclusion of the 90-day period. We deem it unnecessary to modify the opinion because the opinion as written

includes those terminated after May 31, 1970. The petitioners also seek modification of the opinion to include in the class employees whose maternity leaves of absence expired during the 90-day filing period. This request is denied because all are of the opinion that permanent termination occurred *in actuality* when a child was born or adopted. See Slip Op. at 14 n. 13.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

IN RE CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES	Master File No. 70 C 2071 This document relates to: No. 70 C 2069 No. 70 C 2071 No. 72 C 498 No. 74 C 2063 No. 74 C 2762

MEMORANDUM OPINION AND ORDER

On November 18, 1974, The Honorable Richard J. McLaren issued a memorandum opinion and order allowing defendants Trans World Airlines, Inc. and American Airlines, Inc. to amend their answers to include the "affirmative defense" of the statute of limitations contained in 42 U.S.C. § 2000e-5e. This statute imposed a ninety-day period after an alleged unlawful practice within which a charge could be filed with the Equal Employment Opportunity Commission. Judge McLaren noted and left open the question of whether defendants' delay in pleading the defense of limitations constituted a waiver of the defense.

Defendants are now moving to exclude certain persons of plaintiffs' class for lack of subject matter jurisdiction, urging that Title VII's time limits are not a matter of defense but are, rather, jurisdictional prerequisites not subject to waiver by the actions of the defendants. Factually, they are seeking to exclude all persons whose employment was terminated on the grounds of pregnancy more than ninety days prior to May 31, 1970, the

date of filing by the original plaintiff-union, Air Line Stewards and Stewardesses Association, Local 550.

Several courts have recently considered the question of whether Title VII's time limits are in the nature of statutes of limitations or jurisdictional prerequisites, and have concluded the former. *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924 (5th Cir. 1975); *Dartt* v. *Shell Oil Co.*, ... F. 2d ....., 13 FEP Cases 12 (10th Cir. 7/22/76); 408 F. Supp. 229 (D. Conn. 1976).

The Seventh Circuit, however, has characterized the issue is jurisdictional. *Choate* v. *Caterpillar Co.*, 402 F. 2d 357 (7th Cir. 1968); *see*, also, *Evans* v. *United Air Lines, Inc.*, 534 F. 2d 1247 (7th Cir. 1976); *McGuire* v. *Aluminum Company of America*, ... F. 2d ....., No. 76-1013 (7th Cir. 9/9/76). This court is persuaded that the Seventh Circuit holding is correct and that the time requirements of Title VII are jurisdictional in nature.[1]

Having so decided, the next question for resolution is whether the claims of certain class members are time-barred. Defendants' motion is grounded upon the assumption that the violation occurred at the moment of termination due to pregnancy and, therefore, the ninety days began to run for each class member at that moment. Plaintiffs, on the other hand, assert the existence of a "continuing violation" which existed at least until the airlines abandoned their policy of refusing to rehire mothers.

We agree with the plaintiffs' view of this action. If this case sought only to challenge the policy of firing pregnant stewardesses, we would agree that the ninety-day limit began to run at the moment of termination. But, as noted in our memorandum opinion and order dated April 28, 1976, this case challenges a policy much more broad than that. It challenges the "no mother-

1. Plaintiffs urge that this court should estop the defendants from raising the jurisdictional question. E.g., *DiFrischia* v. *New York Central Railroad*, 279 F.2d 141 (3rd Cir. 1960). Because of the view we take of this case, we need not reach this extraordinary estoppel question.

hood" policy which begins at pregnancy, yet continues to prevent re-hiring of the alleged class members once pregnancy is at an end. Thus, we find a continuing violation of plaintiffs' rights which existed until the time that defendants changed the challenged policy.[2] *See Boudreaux* v. *Baton Route Marine Contracting Co.*, 437 F. 2d 1011 (5th Cir. 1971); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979 (D. C. Cir. 1973). Because of the essential difference between the parties as to the nature of the violation here, and the court's agreement with the plaintiffs' position, defendants' authorities do not compel a different result.[3]

For the foregoing reasons, defendants' motion to exclude certain persons from the class for lack of subject matter jurisdiction is hereby denied.

ENTER:

/s/ FRANK J. MCGARR
United States District Judge

Dated; October 15, 1976

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2. We note further, although we do not base our holding today thereon, plaintiffs' allegations that the effects of the discriminatory policy continued past that date as to all stewardesses who were not rehired pending the outcome of this case because they failed to waive their claims to back-pay. The allegation with respect to back-pay appears to be within the scope of *Evans* v. *United Airlines, Inc., supra.* Perpetuation of a disadvantage suffered because of a past discrimination is itself a violation thereunder.

3. We have considered, too, the Memorandum of Movants for Intervention in Reply to Plaintiffs' Memorandum in Response to Defendants' Motion to Exclude Certain Persons From the Class. The memorandum is directed basically towards a final remedy in this case and against various allegations made by plaintiffs with respect to this predecessor union's good faith. That memorandum does not call for a different result within the context of this motion.

MEMORANDUM OPINION AND ORDER IN NOS. 70 C 2069 AND 70 C 2071

(Entered November 20, 1974)

These actions are class action Title VII equal employment sex discrimination cases challenging the practice of Trans World Airlines and American Airlines of terminating the employment of pregnant stewardesses. The cases are now before the Court on defendants' motions to amend their answers to include the affirmative defense of the statute of limitations.[1] Plaintiffs oppose these motions, asserting that (1) defendants have been guilty of unreasonable delay in asserting this defense, and (2) justice does not require defendants' being granted leave to amend because it would be unduly prejudicial to plaintiffs.

The following facts are relevant to disposition of these motions:

The complaints were filed on August 18, 1970, and defendants' answers were submitted to the Court on September 30, 1970.[2] There were no further proceedings in Court until July 16, 1971, when a settlement agreement was filed. But in the interim the airlines and the union amended their labor agreements to eliminate pregnancy as a ground for termination, and negotiated the settlement agreement. The hearing on that agreement began on March 10, 1972; the intervening delays was

1. The statute of limitations for Title VII actions is contained in 42 U. S. C. § 2000e-5e. At the time these actions were filed, the statute provided that to sustain an action under Title VII a charge must have been filed with the Equal Employment Opportunity Commission within 90 days after the alleged unlawful employment practice occurred. The time limit was increased to 180 days by the amendment of March 24, 1972 (P. L. 92-261, § 4).

2. Defendants' answers contained two other affirmative defenses: first, that defendants' conduct was based upon a continuing policy which was a "bona fide occupational qualification reasonably necessary to the normal operation' of defendant's business within the meaning of 42 U. S. C. § 2000-2(e)," and the second, that the policy is "pursuant to a 'system which measures earnings by quantity and quality of production' within the meaning of 42 U. S. C. § 2000e-2(h)."

caused by the effort of the EEOC to intervene, including its appeal to the Seventh Circuit. On April 11, 1972, several plaintiffs filed their notices of appeal from the order approving the settlement agreement. Their appellants' brief was not filed until February 5, 1973. The Seventh Circuit decision reversing the order approving settlement was issued on December 23, 1973,[3] the Supreme Court denied a writ of certiorari on May 13, 1974. The case was assigned to this Court on July 11, 1974. TWA and American then filed their motions to amend the answers on September 11, 1974, the date set by the Court for a status report.

F. R. Civ. P. 15(a) provides that leave to amend "shall be freely given when justice so requires." The Supreme Court in *Forman* v. *Davis*, 371 U. S. 178, 182 (1962) held that this mandate is to be heeded, stating:

> "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' "

In the instant actions, plaintiffs could be unduly prejudiced by amendment. The absence of the defense of limitations could have been considered by the present plaintiffs when they rejected the union-airlines settlement agreement and appealed the orders approving settlement to the Seventh Circuit. At that time plaintiffs could reasonably believe that the pleadings were completed especially considering the class allegations contained in these

3. In *Air Line Stew. & S. Ass'n, Local 550* v. *American Airlines*, 490 F. 2d 636 (7th Cir. 1973), the court of Appeals reversed the settlement order previously entered in these actions. The court held that the Union could not act as representative of the individual stewardesses terminated because of conflict of interest in the Union over such matters as seniority. Moreover, the court determined that these actions should proceed as R. F. Civ. P. 23(b)(3) class actions instead of F. R. Civ. P. 23(b)(2) class actions.

actions. Notice of the proposed settlement to members of the classes invited "any interested person or attorney" to inspect "all pleadings and other documents in the action." None of the documents apparently contained any notice of the statute of limitations defense althought the Union's attorney did mention the possibility of the defense during oral hearings on the settlement agreement.

Plaintiffs also argue that even if undue prejudice cannot be shown, defendants should not be allowed to amend because they have been guilty of undue delay in asserting the limitations defense. Defendants justify their delay in filing the defense on three grounds: (1) legal uncertainty about availability of the defense; (2) active participation in the aborted settlement negotiations and (3) no district court judge had jurisdiction over the actions while the various appeals were pending.

Defendants assert that when the complaints were filed in 1970, there had been few decisions construing the limitations problems inherent in Title VII class actions. It is important to note, however, that defendants do not claim that the limitations language of the statute was ambiguous, nor do defendants assert that there were no cases to rely on for guidance. In fact, defendants cite a 1969 case, *Burney* v. *North American Rockwell*, 302 F. Supp. 86 (C. D. Cal. 1969), to support their substantive point that the Title VII statute of limitations affects unnamed class plaintiffs as well as named or individual plaintiffs.

Moreover, defendants make no showing how these proceedings could have prevented them from making a motion to the Court to amend their answers, particularly when defendants original answers contained two other affirmative defenses. Additionally, the existence of this defense, properly plead, should have been a factor in defendants' posture during this stage of the litigation. That defendants failed to fully investigate the legal status of plaintiffs' claims at that time only demonstrates that defendants may not have completely prepared during settle-

ment negotiations, not that the negotiations themselves prevented defendants from presenting their legal arguments to the Court.

Defendants' third argument that the pending appeals prevented them from amending also seems inequitous. While it is true that for substantial periods since filing in 1970 no district court judge had jurisdiction over these cases, defendants do not satisfactorily explain why when the district court did have jurisdiction (from filing in 1970 to April 1972), they made no motion to amend.

Defendants' delay in pleading the defense of limitations may well ultimately constitute a waiver of the defense; at this juncture, however, the Court is not convinced to a legal certainty that pleading of the defense shall not be allowed. Under the liberal pleading rules contained in Rule 15, defendants should be entitled to prove through discovery techniques or otherwise that the plaintiffs suffered no prejudice or that the delay in amendment was excusable. Defendants' motion to amend their answers is granted.[4]

IT IS SO ORDERED.

Entered:

/s/ R. W. McLaren

Dated: November 18, 1974. *United States District Judge*

4. Of course, this disposition of defendants' motions is not intended to express any ultimate views on the waiver or laches issues or the substantive applicability of the 180 day statute of limitations.

EXCERPT FROM TRANSCRIPT OF HEARING WHICH COMMENCED ON MARCH 10, 1972

We have agreed that all these girls, all these girls who were terminated, whether by resignation or involuntarily, may go back to work.

The Court: In other words, you are waiving any question of statute of limitations, if there is one?

Mr. Carr: That is correct. Furthermore, we have made a concession that they can choose the [546] base from which they can operate. In the case of a married girl, this is an important concession. In addition, we are giving them the full seniority they left with, and that is what the girls under the present leave of absence agreement have. They do not come back with seniority for the time they were off. They come back with seniority as of the time they left.

Now, this seniority need not have been given to them at all on a settlement agreement, but they were given the full seniority they had earned, and this was, as Mr. Feldman pointed out, in derogation of those girls who are presently flying.

Now, I think I have said enough to suggest that on the issues in this case, the outcome is at least questionable, that very substantial benefits accrued to these girls, and I think there is no question but what the settlement is fair, unless you are propagandized into or have persuaded yourself into an attitude that there is nothing to this case but walking into court and getting all the results that would come from an adjudication on the merits.

[547] We are a long way from an adjudication on the merits. We are an even longer way, conceptually, from an adjudication on the merits in favor of the plaintiffs. I would like now briefly to turn my attention to 23(b)(2). There have been various comments about separate classes in this case—

The Court: Just a moment, please.

Nos. 78-1545 and 80-951 (Consolidated)

Office-Supreme Court, U.S.
FILED
JUL 9 1981
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANNE B. ZIPES, et al.,

Petitioners,

vs. No. 78-1545

TRANS WORLD AIRLINES, INC.

Respondent,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

vs. No. 80-951

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX
VOLUME I

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PETITION FOR CERTIORARI IN NO. 78-1545 FILED APRIL 10, 1979 AND IN NO. 80-951 ON DECEMBER 12, 1980. CERTIORARI GRANTED MARCH 9, 1981.

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Entries are in District Court Case # 70 C 2071 except as noted.

8-18-70	Filed complaint
8-20-70	Order that cause be assigned to Judge Perry, as being related to 70 C 2069 pursuant to Rule 10B 4(c) of the General Rules of this court
9-30-70	Filed Answer
3-4-71	Filed motion of plaintiffs for summary judgment
7-16-71	Filed defendant's petition, and notice of settlement hearing, and agreement of compromise and settlement Entered order and order to show cause. Hearing to determine fairness of agreement and to show cause set for 1:30 p.m., August 30, 1971
8-6-71	Filed EEOC's motion to intervene
8-11-71	Entered order motion to intervene denied
8-12-71	Filed notice of appeal by EEOC
8-25-71	Filed order of U.S.C.A. 7th Circuit No. 71-1615 that the emergency motion of EEOC be granted and further proceedings be stayed
2-23-72	Filed opinion of U.S.C.A. No. 71-1615 denying EEOC motion to intervene
3-10-72	Hearing on objections to proposed settlement
3-17-72	Settlement approved and judgment order entered
4-11-72	Filed notice of appeal by Patricia A. Santini, Pamela J. Dailing, and Anne B. Zipes
5-22-74	Filed order from U.S.C.A. No. 72-1335 reversing judgments of district court
7-15-74	Entered order assigning case to Judge McLaren
7-22-74	Filed complaint in No. 74 C 2063
9-11-74	Filed TWA's motion to dismiss in No. 74 C 2063
9-16-74	Filed defendant's motion to amend answer

9-16-74	Entered order appointing Patricia A. Santini, Pamela J. Dailing and Anne B. Zipes class counsel and Arnold I. Shure and Charles Pressman class counsel. Ruling date on motion to amend is set for November 4, 1974 at 10 a.m.
10-2-74	Filed amended motion to dismiss of ALSSA in No. 74 C 2063
10-10-74	Filed order approving plaintiffs' notice to class
11-19-74	Entered order consolidating cases for purposes of discovery pretrials etc.
11-21-74	Entered memorandum opinion and order granting defendant's motion to amend answer
12-16-75	Filed defendant's motion for order excluding certain persons from class for lack of subject-matter jurisdiction
12-17-75	The motion for the exclusion of certain persons of the class for lack of subject matter jurisdiction is entered and continued until after the court rules on plaintiffs motion for summary judgment and at that time a briefing schedule will be established re: the motion to exclude. —McLaren, J.
3-12-76	Entered order assigning cause to Judge McGarr
3-16-76	Filed defendant's motion for order establishing briefing schedule on jurisdiction motion, affidavit Doris Owen, and Exhibit A
7-9-76	Filed plaintiffs' motion for summary judgment
10-19-76	Enter order dated October 15, 1976: Pursuant to memorandum opinion and order entered this day, defendants' motion to exclude certain persons from the class for lack of subject matter jurisdiction is denied.
10-19-76	Enter order dated October 18, 1976: Pursuant to memorandum opinion and order entered this day, plaintiffs' motion for summary judgment on the issue of TWA's liability for violation of Title VII of the Civil Rights Act is granted.

12-16-76	Enter order dated December 15, 1976. Enter amendment to order that the orders entered on October 18, 1976 granting Summary Judgment against Trans World Airlines, Inc., and on October 15, 1976 denying Trans World Airlines' motion to exclude are amended by adding the following to each order: This court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Draft-McGarr, J.
2-7-77	Filed certified copy of order from U.S.C.A. 7th circuit dated February 3, 1977: It is ordered that the District Court defendants, American Airlines, Inc., and Trans World Airlines, Inc. are hereby Granted permission to appeal from the three interlocutory orders entered by the District Court on April 28, 1976, October 15, 1976 and October 18, 1976, as amended on 12/15/76 pursuant to 28 U.S.C. 1292(b)
8-24-78	Opinion of U.S.C.A. for Seventh Circuit in *In re: Consolidated Pretrial Proceedings in the Airline Cases,* Docket No. 77-1325
1-11-79	Petitions for rehearing denied in Court of Appeals Docket No. 77-1325
6-29-79	Filed 6-27-79, Settlement agreement. Enter order dated 6-26-79: Plaintiffs' proposed settlement agreement is entered. The form of a notice to class members is hereby approved. Hearing on approval of settlement set for July 31, 1979 at 10 A.M.
7-27-79	Filed 7-25-79, Independent Federation of Flight Attendants' motion to intervene
8-6-79	Enter order dated 8-3-79: Motion of Independent Federation of Flight Attendants to Intervene is granted. Intervenor is granted to and

	including August 10, 1979 to file supplementary memorandum on jurisdiction
8-23-79	Enter order dated 8-23-79: Leave granted to file amendment to settlement agreement
8-23-79	Filed 8-23-79, amendment to settlement agreement
9-19-79	Enter order dated 9-14-79: Union-Intervenor's objection to this court's jurisdiction and authority to approve the proposed settlement agreement is hereby overruled
11-13-79	Enter order dated November 8, 1979: Enter Order approving settlement and dismissing actions
11-13-79	Enter order dated November 8, 1979: Enter order awarding seniority
12-5-79	Filed 12-4-79 intervenor-defendant Independent Federation of Flight Attendants' notice of appeal from order docketed on November 13, 1979
6-13-80	Opinion and judgment of Court of Appeals for Seventh Circuit in U.S.C.A. Docket #79-2460
9-17-80	Order of Court of Appeals in Docket #79-2460 denying petition for rehearing

Rec. No. 2

UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO; Pamela Dailing; Sadie Sue Lake; Pat Santini; Virginia Hirt; and Bonnie Yoder, *Plaintiffs,*	Civil Action No. 70 C 2071.
vs.	
Trans World Airlines, Inc., *Defendant.*	

COMPLAINT

(Filed August 18, 1970)

Now comes Plaintiffs by their attorneys and complain of the Defendant as follows:

1. This is a class action, authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. 2000e, et seq. Jurisdiction of the Court is invoked pursuant to 28 U. S. C. 1343(4); 42 U. S. C. 2000e-5(f), 28 U. S. C. 2201 and 2202 and 42 U. S. C. 1981.

2. Plaintiff Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO (hereinafter referred to as "Plaintiff Union") is a labor union and a representative of employees as defined in the Railway Labor Act, 45 U. S. C. 151.

3. Defendant corporation is a carrier by air and an employer as defined in 45 U. S. C. 151 and 181. Defendant does business in the City of Chicago and State of Illinois. Unlawful employment practices as alleged herein have been committed by

Defendant in the City of Chicago and State of Illinois. Plaintiffs in this cause would have worked in Chicago, Illinois, but for the unlawful employment practice committed by Defendant. Defendant is engaged in an industry affecting commerce, is the employer of more than 100 persons and is an employer within the meaning of 42 U.S.C. 2000e-(b).

4. The individual Plaintiffs named herein were employed by Defendant as female flight cabin attendants prior to the events, and the commission of unlawful employment practices alleged herein. Each individual Plaintiff has been, desires to become and/or in the future will desire to become pregnant. Said Plaintiffs bring this action, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on their own behalf and on behalf of all female flight cabin attendants similarly situated currently employed by Defendants and/or employed by Defendant at any time since July 2, 1965 (hereinafter referred to as the "Class"). There are common questions of law and fact affecting the rights of members of the Class who are, and continue to be, deprived of rights by reason of the unlawful employment practices committed by Defendant as hereinafter alleged. These persons are so numerous that joinder of all members is impracticable. Common relief is sought. The interests of the Class are adequately represented by Plaintiffs. Defendant has acted or refused to act on grounds generally applicable to the Class. The relief requested herein is appropriate with respect to the Class as a whole.

5. Plaintiff Union is, and at all times material herein has been, the certified bargaining representative under the Railway Labor Act of flight cabin attendants employed by the Defendant, including the individual and Class Plaintiffs named and referred to herein. As such representative, the Plaintiff Union has the legal duty to act impartially and fairly represent the interests of the individual Plaintiffs and the Class they represent. The commission by Defendant of unfair employment practices hereinafter alleged jeopardizes the Plaintiff Union's

duty of fair representation to the individual Plaintiffs and the members of the Class. Plaintiff Union brings this action on its own behalf and on behalf of its members within the Class.

6. This is a proceeding (a) for a declaratory judgment as to the rights of the parties, (b) for a preliminary and permanent injunction, restraining and enjoining Defendant from discriminating against members of the Class because of their sex in ways which deprive them of equal employment rights and opportunities and affect their status as employees, and (c) for monetary relief and other appropriate relief.

7. The Defendant has intentionally and willfully engaged in unlawful employment practices, violative of 42 U.S.C. 2000e-2, continuously from July 2, 1965, the effective date of the Act, and still continuing, as follows:

(a) It has maintained a practice, policy or usage whereby it terminates the employment of female flight cabin attendants who become pregnant;

(b) It has, in the course of collective bargaining, demanded of the Plaintiff Union that, contrary to the desire and will of the Plaintiff Union, it accept and accede to a contract provision, practice, policy, or usage whereby female flight cabin attendants employed by it are terminated as employees when they become pregnant.

(c) It has terminated the employment of the individual Plaintiffs and the members of the Class they represent when such female persons, married or single, became pregnant. Such termination of employment has been effectuated by discharge, requested or demanded resignation or refusal to schedule such employees for further flying. Defendant has not terminated the employment of its male employees who have fathered children.

8. In response to a demand by the Plaintiff Union that it cease from the commission of such unfair employment prac-

tices, Defendant, on or about April 7, 1970, affirmed its intention to continue such conduct.

9. Grievances have been filed by the Plaintiff Union and its members under the collective bargaining contract between the Plaintiff Union and the Defendant protesting the aforesaid conduct by Defendant, but Defendant has in all cases denied such grievances.

10. Each of the individual Plaintiffs, and each member of the Class represented by them, has suffered and will continue to suffer irreparable harm by reason of the illegal conduct of Defendant. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein unless this Court affords them the equitable relief prayed for.

11. On or about June 1, 1970, the Plaintiff Union filed a charge with the Equal Employment Opportunity Commission (hereinafter referred to as the EEOC) alleging the aforesaid unfair employment practices. The EEOC notified the Plaintiff Union on July 31, 1970, that it was entitled to initiate a civil action in a United States District Court, as provided in 42 U.S.C. 2000e-5(e) and (f). The Plaintiff Union has its offices in the State of Illinois. Illinois does not have a law prohibiting the unlawful employment practices complained of herein.

Wherefore, Plaintiffs respectfully pray that this Court advance this case on the docket, order a speedy hearing at the earliest practical date, and, upon such hearing:

(a) Declare the rights of the parties, finding that the aforesaid practice, policy, usage and/or contract provision and conduct of the Defendant are violative of the Act;

(b) Grant Plaintiffs and the Class they represent a preliminary and permanent injunction enjoining Defendant from conduct violative of the Act;

(c) Order Defendant by mandatory injunction to take such affirmative actions as are necessary to assure that the

effects of said violations are eliminated and do not continue to adversely affect the employment rights of Plaintiffs and the Class they represent;

(d) Order Defendant to provide monetary relief including back pay to any of the Plaintiffs or members of the Class they represent for monetary losses sustained by them by reason of the violations of the Act by Defendant;

(e) Order Defendant to pay Plaintiffs' costs in this action;

(f) Order the Defendant to pay a reasonable attorneys' fee; and

(g) Order such other and additional relief as to the Court seems necessary or proper.

/s/ Gilbert Feldman
Gilbert Feldman
/s/ Barbara J. Hillman
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Rec. No. 7

* * (Caption—No. 70 C 2071) * *

ANSWER

(Filed September 30, 1970)

Defendant Trans World Airlines, Inc., answers the complaint as follows:

1. Defendant admits the allegations of paragraph 1 that this Court has jurisdiction under Title VII of the Civil Rights Act of

1964, but denies the other allegations of paragraph 1, including the implication that it has violated that Act and that this is a proper class action.

2. Defendant admits the allegations of paragraph 2.

3. Defendant admits the allegations of paragraph 3 that it is a carrier by air as defined in 45 U.S.C. § 151 and § 181, that it does business in the City of Chicago and State of Illinois, that it is engaged in an industry affecting commerce, that it is the employer of more than 100 persons, and that it is an employer as defined in 42 U.S.C. § 2000e-(b). Defendant denies the other allegations of paragraph 3, including the allegations that it has committed unlawful employment practices in the City of Chicago and State of Illinois, or elsewhere, and that plaintiffs Pamela Dailing, Sadie Sue Lake, and Pat Santini would have worked in Chicago, Illinois, but for the termination of their employment by defendant.

4. Defendant admits the allegations of paragraph 4 that the individual plaintiffs were formerly employed by it as hostesses and that all of the individual plaintiffs with the exception of Bonnie Yoder have applied to defendant for maternity leave. It admits that Bonnie Yoder has been pregnant. Defendant denies the other allegations of paragraph 4, including the allegation that it has committed unlawful employment practices.

5. Defendant admits the allegations of paragraph 5 that plaintiff union is, and at all times material herein has been, the bargaining representative under the Railway Labor Act of hostesses employed by it, including the individual plaintiffs; that as such representative it has the legal duty to act impartially and fairly represent hostesses in the employ of defendant. Defendant denies the other allegations of paragraph 5.

6. Defendant admits the allegations of paragraph 6.

7. Defendant denies the allegations of paragraph 7. It alleges that since November 7, 1968, it has furnished to each of

its hostesses including the individual plaintiffs a flight service manual containing the following statement of policy:

(a) *Married Hostesses.*

> If a hostess becomes pregnant or adopts a child, she will be required to immediately resign from the Hostess Department. In such case, it will not be necessary to give two (2) weeks notice. Hostesses resigning due to the above will be credited with all accumulated vacation time for pay purposes. Hostesses desiring to continue employment with the Company may request transfer to a ground position or may request a maternity leave.

[T]hat pursuant to its policy of prohibiting a hostess from flying while pregnant, and thereafter if a child is born, defendant has terminated the employment of the individual plaintiffs. It alleges that said policy by its terms covers only female hostesses, that defendant does not presently employ males in the hostess occupation (although it does employ males in a different occupation, that of purser), and that there has been no unlawful discrimination in the termination of the individual plaintiffs. It alleges that unlike fatherhood, pregnancy is physically disabling. It alleges that said policy is based upon economic, medical and operational considerations. A hostess who is pregnant is not physically able to perform her duties in the air; a longer leave of absence for pregnancy is necessary for hostesses than in the case of most other occupations; when following pregnancy a hostess is again physically able to perform her duties in the air, she must receive lengthy and costly retraining because of equipment and procedural changes affecting her job which have taken place since her leave of absence commenced. The occupation of hostess also differs from other occupations with respect to her ability to make adequate day care arrangements for any children; her employment may require her to spend many days and nights away from home and to be, frequently for many hours at a time, in flight and unable to communicate with her family (defendant's

hostesses may fly from points in the United States to points in distant countries); to subject the mother to a job which will carry her out of communication with an infant during its formative years and when it is especially susceptible to illness will tend to create a stress which will prevent her from devoting her best efforts to the performance of her duties; the existence of stress upon a hostess defeats a primary purpose of her job—to allay fears of passengers and set their minds at ease; in the event of sickness or other emergency involving her child, a substitute hostess must be provided and special transportation arrangements made by defendant. It is not economically feasible for defendant to terminate hostesses on an individual basis who are unable to satisfactorily perform their jobs because of pregnancy or domestic responsibilities resulting from pregnancy. Defendant alleges that a similar policy is followed by other air lines and is contained in collective bargaining agreements to which plaintiff union is a party.

8. Defendant admits the allegations of paragraph 8.

9. Defendant admits the allegations of paragraph 9 that grievances have been filed by plaintiff union and by plaintiffs Pamela Dailing, Sadie Sue Lake, and Bonnie Yoder under the collective bargaining agreement between plaintiff union and defendant protesting termination of employment and that defendant has denied such grievances. Defendant alleges that these plaintiffs made an election of remedies by first pursuing the grievance procedure and are thereby precluded from maintaining this action.

10. Defendant denies the allegations of paragraph 10, except that the allegation that plaintiffs have no remedy at law except for the equitable relief prayed for is conclusory and requires no answer.

11. Defendant admits the allegations of paragraph 11, except that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11

that on or about June 1, 1970, plaintiff union filed a charge with the EEOC alleging unfair employment practices, and that the EEOC notified plaintiff union on July 31, 1970, that it was entitled to initiate a civil action in a United States District Court.

First Affirmative Defense

12. Defendant's policy of prohibiting a hostess from flying while pregnant, and thereafter if a child is born, is based upon a "bona fide occupational qualification reasonably necessary to the normal operation" of defendant's business within the meaning of 42 U.S.C. § 2000e-2(e) and, therefore, the termination of individual plaintiffs was not an unlawful employment practice.

Second Affirmative Defense

13. To the extent that defendant's said policy prescribes different terms, conditions or privileges of employment for hostesses, to-wit, that a hostess is prohibited from flying while pregnant, and thereafter if a child is born, the same was and is included therein pursuant to "a system which measures earnings by quantity and quality of production" within the meaning of 42 U.S.C. § 2000e-2(h) and, therefore, the termination of the individual plaintiffs was not an unlawful employment practice.

Wherefore, Defendant Trans World Airlines, Inc. prays that the complaint be dismissed, that defendant be awarded its costs incurred herein, and for such other and further relief as to the Court may seem just and proper.

Gardner, Carton, Douglas, Chilgren
& Waud
By: /s/ Laurence A. Carton
/s/ Joseph P. Carr
Attorneys for Defendant
Trans World Airlines, Inc.

Admitted Rec. by USCA order 4-13-73

LETTER TO UNION CONCERNING AMENDMENT TO LABOR CONTRACT

(October 26, 1970)

Mr. J. D. Preston
President, Local 550
Air Line Stewards & Stewardesses Association
205 West Wacker Drive
Chicago, Illinois 60606

Dear Mr. Preston:

This will confirm our conversation of this date concerning the implementation of Article 15(G) of the Agreement dated October 22, 1970.

Hostesses who left the Company on or after August 1, 1969, by reason of pregnancy will be offered the opportunity to return to active service as a flight attendant provided that she notifies the Company of such intent within 30 days of receipt of the offer of reinstatement. She will be required to submit a doctor's statement if now pregnant, or a birth certificate if delivery has occurred. If delivery was six or more months prior to November 16, 1970, return to active duty must occur on or before January 1, 1971, or she shall be ineligible to do so. If delivery was within six months of November 16, 1970, the provisions of Article 15(G) will be applied.

In any event, seniority will not commence to accrue until such time as the hostess has returned to active duty. No seniority will be credited for time off as a result of this Agreement.

Any hostess returning pursuant to this letter or Article 15(G) will be required to meet the appropriate standards in effect at the time she left active duty.

Very truly yours,

T. M. Cromartie
Director
Labor Relations-Flight

cc: Miss C. Cross
Mr. G. L. Twyman

Article 15

LEAVES OF ABSENCE

(A) When the requirements of the service will permit, an employee may be granted a personal leave of absence for a period not in excess of one hundred and eighty (180) days, upon receipt by the employee's supervisor of a written request, setting out the reasons therefor. When such leave is granted, the employee shall retain, and shall continue to accrue, seniority, except for pay purposes, only during the first ninety (90) days of such period. Such leave may be extended for additional periods not to exceed ninety (90) days each, when approved in writing by the employee's supervisor, but during such extended leaves other than the first leave, seniority shall be retained but shall not continue to accrue. If the employee engages in other employment within the field of aviation without prior written permission of the Company, she or he shall be deemed to have resigned and her or his name will be removed from the seniority list.

(B) When leaves of absence are granted by the Company because of sickness or injury, an employee's seniority shall accrue, except for pay purposes, until he or she is able to return to duty or is found to be unfit for such duty, except that in no case shall leave for sickness or injury exceed a total continuous period of three (3) years. Return to duty after such leave shall be subject to a reasonable trial period not to exceed ninety (90) days. When leave of absence is granted for industrial injury, an employee's seniority shall accrue for pay purposes.

(C) An employee hereunder accepting an official position with the Association may, by mutual consent between the Company and the Association, be granted a leave of absence by the Company for a period of one (1) year, which may be extended by agreement between the Com-

pany and the Association, as long as this Association remains the exclusive bargaining agency of employees covered by this Agreement. An employee granted leave under this paragraph shall continue to accrue seniority, except for pay purposes, and shall return to duty subject to (E) of this Article.

(D) Immediately after expiration of a leave of absence granted under (A) of this Article, a Flight Attendant may exercise bidding privileges on any vacancy existing on the system. If such employee fails to become a successful bidder, she or he may displace the least senior employee in her or his status on the operation to which the returning employee was assigned immediately prior to the leave, provided that such employee is senior to the employee being displaced. If the returning employee does not displace, she or he will immediately be placed on furlough status and the provisions of Article 12 shall apply.

(E) Immediately after the expiration of a leave of absence granted under (B) or (C) of this Article, a Flight Attendant may displace the least senior employee in her or his status at the location where the returning employee was assigned immediately prior to the leave, provided that such employee is senior to the employee being displaced. If unable to so displace because of seniority, the provisions of (D) of this Article shall apply.

(F) When an employee is granted a leave of absence for extended active military duty, he or she shall retain, and continue to accrue, seniority until ninety (90) days after termination of such active duty. Return to duty with the Company from such leave shall not entitle the employee to any greater relative seniority than would have occurred had the employee not taken such military leave. As soon as possible, but in no event later than the completion of the ninety (90) day period mentioned in this paragraph,

an employee hereunder will displace the least senior employee in her or his status at the location where the returning employee was assigned immediately prior to the leave, provided that such employee is senior to the employee being displaced. If unable to so displace because of seniority, the provisions of (D) of this Article shall apply.

(G) A female employee, upon discovery that she is pregnant, shall notify the Company and upon such notice the employee will be removed from service. If the employee fails to give the Company notice as required above, the case will be handled as circumstances indicate subject to Article 16. An employee who has given notice of her pregnancy and does not wish to resign may request a maternity leave of absence for the term of the pregnancy and for a period of three (3) months immediately following delivery. To support the request for such leave, the employee will be required to submit a physician's statement verifying the pregnancy. At the end of the period described immediately above, the employee must be available to return to active flight duty unless additional leave is requested and supported by her physician's statement indicating that additional time is necessary.

In no event shall a maternity leave exceed six (6) months following delivery. Return to service shall be contingent upon successfully passing a Company physical. An employee granted a maternity leave under the provisions of this paragraph shall retain, but not accrue, seniority during such leave and shall not accrue vacation, sick leave or longevity for pay purposes and shall not be eligible for sick leave benefits for time lost as a result of pregnancy.

(H) Employees returning from leaves of absence under this Article 15, must meet the Company standards required to be met prior to the leave.

Rec. No. 31

* * (Caption No. 70 C 2071) * *

PETITION

(Filed July 16, 1971)

Now come Laurence A. Carton and Joseph P. Carr, attorneys for defendant, and petition this Court for the entry of an Order and Order to Show Cause attached hereto, and in support thereof state:

1. On August 18, 1970, Local 550 and five former hostesses of defendant filed this action against defendant under Title VII of the Civil Rights Act of 1964 ("the Act") on behalf of themselves and of other persons similarly situated who had been employed by defendant at any time since July 2, 1965, the effective date of the Act. Plaintiffs alleged that defendant had discriminated against such persons on the basis of sex in violation of the Act. They alleged that defendant had maintained a practice of terminating the employment of hostesses who became pregnant and that it had not terminated the employment of its male employees who had fathered children. The complaint sought among other things a declaration that this practice violates the Act, an injunction ordering defendant to take appropriate affirmative action as provided under the Act, and monetary relief.

2. Defendant contested the suit on a number of grounds set forth in its answer to the complaint. On February 26, 1971, plaintiffs filed a motion for summary judgment together with a brief in support thereof. On April 28, 1971, the Equal Employment Opportunity Commission filed an amicus curiae memorandum in support of the motion.

3. Thereafter settlement negotiations were begun between the parties resulting in an agreement, the terms of which are embodied in the written Agreement of Compromise and Settlement which is submitted herewith to the Court. The agreement provides a plan for reemployment of former hostesses who

were removed from the payroll of defendant between July 2, 1965, and July 31, 1969 (the effective date of an agreement between plaintiff union and defendant providing maternity leaves of absence for hostesses) because of pregnancy.

4. Defendant has denied and continues to deny the material allegations of the complaint. Defendant has concluded that the proposed settlement is fair and reasonable and merits the approval of this Court, and that it is desirable to put an end to the present controversy, without awaiting the ultimate results of the litigation, after appeals, if any, and to avoid further litigation expense.

5. Petitioners respectfully request the Court to enter the attached Order and Order to Show Cause finding that the members of the class consist of all former hostesses who were removed from the payroll of defendant between July 2, 1965, and July 31, 1969, because of pregnancy.

Wherefore, petitioners pray for the entry of the attached Order and Order to Show Cause, and that following a hearing the Court enter a further order approving the Agreement of Compromise and Settlement, and dismissing the action on the merits with prejudice.

Dated: July 14, 1971.

/s/ Laurence A. Carton
Laurence A. Carton

/s/ Joseph P. Carr
Joseph P. Carr
Attorneys for Defendant

Gardner, Carton, Douglas,
Chilgren & Waud
One First National Plaza, 4600
Chicago, Illinois 60670

Rec. No. 33

* * (Caption—No. 70 C 2071) * *

ORDER AND ORDER TO SHOW CAUSE

(Entered July 16, 1971)

The parties hereto having entered into an Agreement of Compromise and Settlement ("Agreement") dated July 14, 1971, subject to the approval of the Court, and

The parties having applied to the Court for the approval of the Agreement as fair and reasonable,

Upon the Agreement dated July 14, 1971, and executed by the attorneys for plaintiffs and defendant in the above entitled action, the pleadings herein, the annexed Notice of Settlement Hearing; and upon the undersigned consent of the attorneys for all parties appearing in the action; and it appearing that the proposed settlement embodied in the Agreement may be a fair and reasonable one and that a hearing should be held to determine whether the same should be approved by the Court, it is hereby

A. Ordered, that the above entitled action is properly maintainable as a class action and that the members of the class consist of all former hostesses who were removed from the payroll of defendant between July 2, 1965, and July 31, 1969, because of pregnancy; and it is

B. Further ordered, that a hearing be held before the undersigned in the Courtroom of Judge Joseph Sam Perry of the United States District Court, Northern District of Illinois, Eastern Division located in Chicago, Illinois, on August 30, 1971, at 1:30 P.M. Central Daylight Time for the purpose of determining whether the Agreement is fair and adequate and should be approved; and it is

C. Further ordered, that notice shall be given by plaintiff union publishing in its newspaper a copy of the annexed Notice

of Settlement Hearing, the publication to be not less than 30 days before the hearing, and that such notice shall constitute the best notice practicable to the members of the class and shall constitute due and sufficient notice of said hearing to each member of the class and that the parties shall, on or before the date of such hearing file in this Court proof of publication in accordance herewith; and it is

D. Further ordered, that at the aforesaid hearing to be held on August 30, 1971, each member of the class show cause why (1) the aforesaid Agreement should not be approved by the Court, and (2) final judgment should not be entered thereon.

Dated:

Jul 16 1971
/s/ J. S. Perry

The undersigned hereby consent to the entry of the foregoing Order.

/s/ Laurence A. Carton
Laurence A. Carton

/s/ Joseph P. Carr
Joseph P. Carr

/s/ Gilbert Feldman
Gilbert Feldman

/s/ Barbara J. Hillman
Barbara J. Hillman

Attorneys for Defendant
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One First National Plaza-4600
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RAndolph 6-2452

Attorneys for Plaintiffs
Kleiman, Cornfield & Feldman
Ten South LaSalle Street-452
Chicago, Illinois
RAndolph 6-2922

Rec. No. 32

* * (Caption—No. 70 C 2071) * *

AGREEMENT OF COMPROMISE AND SETTLEMENT

(Filed July 16, 1971)

Whereas, on August 18, 1970, plaintiffs commenced this action on behalf of certain former hostesses who were removed from the payroll of defendant because of pregnancy;

Whereas, defendant has appeared in said action, has denied the material allegations of the complaint by answer, has asserted various affirmative defenses, and has asked that the complaint be dismissed;

Whereas, plaintiffs, while maintaining that the allegations of the complaint would be sustained upon trial, recognize that the pending action involves sharply contested issues of fact and law, that the resolution of these issues and the ultimate results of the litigation after appeals, if any, cannot be predicted, and that the relief provided in attached proposed memorandum of understanding ("Settlement") is substantial; and have concluded that this action should be settled and terminated by appropriate process of this Court in order that members of the class entitled to relief might receive it with a minimum of delay;

Whereas, defendant, while denying the material allegations of the complaint, has entered into this Agreement of Compromise and Settlement ("Agreement") because of its conclusion that the proposed Settlement is fair and reasonable and that it is desirable to put an end to the present controversy, without awaiting the ultimate results of the litigation, after appeals, if any, in order to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation;

Whereas, the purpose of this Agreement is to dispose of and settle all claims or causes of action alleged or which could have been alleged in the complaint and all claims or causes of action

arising or which may arise out of, under, or in connection with any matter or transaction referred to or suggested by the complaint in said action;

Whereas, the plaintiffs and the defendant have concluded that the terms of the Settlement are fair, reasonable and adequate for all of the parties and all persons on whose behalf the action is maintained, and that the Settlement merits the approval of the Court;

Now, therefore, it is agreed:

1. Plaintiffs and the defendant hereto agree that defendant's acceptance of this Agreement is not and shall not be construed as an admission by it or deemed to be evidence of the validity of any of plaintiffs' claims herein or its liability for any thereof or of any unlawful acts by it whatsoever nor shall this Agreement or any of the terms hereof be offered or received in evidence in any civil or administrative action or proceeding as an admission of wrongdoing on the part of the defendant. The defendant expressly disclaims any liability under the complaint herein and states that it is entering into this Agreement to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation.

2. The Settlement shall become effective when the Final Judgment approving this Agreement becomes effective. For purposes of this Agreement the Final Judgment becomes effective if no notice of appeal therefrom is filed with the Clerk of this Court within 30 days of the date of the entry of the Final Judgment.

3. Upon the filing of this Agreement, an Order will be entered as follows:

(a) That the within action is properly maintainable as a class action and that the members of the class consist of all former hostesses who were removed from the payroll of defendant between July 2, 1965, and July 31, 1969, because of pregnancy.

(b) That a hearing be held by the Court in the Courtroom of Judge Joseph Sam Perry of the United States District Court, Northern District of Illinois, Eastern Division in Chicago, Illinois, on such date as the Court may direct, for the purpose of determining whether this Agreement is fair and adequate and should be approved and a Final Judgment entered thereon;

(c) That plaintiff union give notice of said hearing by publishing in its newspaper a copy of the Notice of Settlement Hearing, and that such notice shall constitute due and sufficient notice of said hearing to all of the members of the class and the parties shall, on or before the date of such hearing, file in this Court proof of publication in accordance herewith.

4. At the conclusion of the hearing upon the Order to Show Cause as specified in paragraph 3 hereinabove, an order shall be entered setting forth the findings of the Court as to the fairness, adequacy and propriety of this Agreement and ordering that Final Judgment be entered in accordance with this Agreement, or, if the findings so require, that this Agreement be vacated and declared null and void and the case restored to the status quo.

5. Upon the approval by the Court of this Agreement in accordance herewith, the plaintiffs consent that a Final Judgment be entered by the Court as follows:

(a) That the parties hereto perform the acts called for by this Agreement; and

(b) That all claims or causes of actions alleged or which could have been alleged in the complaint and all claims or causes of actions arising or which may arise out of, under, or in connection with any matter or transaction referred to or suggested by the complaint be dismissed as against the

defendant on the merits and with prejudice and without costs to any party.

6. All parties hereto expressly waive the right to appeal from any judgment of the Court which is consistent with this Agreement.

7. Should this Agreement not be approved by the Court or Final Judgment not entered thereon in accordance with the terms hereof, then this Agreement shall become null and void.

Laurence A. Carton
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One First National Plaza-4600
Chicago, Illinois
RAndolph 6-2452

Gilbert Feldman
Barbara J. Hillman
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Kleiman, Cornfield & Feldman
Ten South La Salle Street-452
Chicago, Illinois
RAndolph 6-2922
Dated: July 14, 1971

MEMORANDUM OF UNDERSTANDING

Any former hostess who was removed from the payroll of Trans World Airlines, Inc. ("the Company") between July 2, 1965 and July 31, 1969 because of pregnancy shall be eligible for re-employment as a hostess under the following conditions:

1. Any such former hostess shall be placed on a preferential hiring list if she gives the Manager-Flight Attendant Planning and Administration, 605 Third Avenue, New York, New York, written notice of her desire to be re-employed as a hostess within sixty (60) days of entry of an order by the United States District Court for the Northern District of Illinois, Eastern Division approving this Memorandum of Understanding. Such notice of intent to return shall also list her perference for domicile, if any, and if more than one domicile is acceptable, she shall list the domiciles in order of her preference. The Company shall have no liability whatsoever to any such former hostess who fails to timely provide such notice.

2. Such former hostess will be allowed all seniority accrued as a hostess prior to her date of termination. Seniority shall begin to reaccrue on the date of her re-employment by the Company.

3. For purposes of offering re-employment, the preferential hiring list prepared pursuant to Paragraph 1 hereof shall, upon expiration of the sixty (60) day period specified in said Paragraph 1, be considered the standing bid of such hostesses. As vacancies occur, they will be awarded in system seniority order, to those hostesses having bids on file, prior to hiring any other person to fill such vacancies.

4. Notice of re-employment as described in Paragraph 3 above, shall be sent by certified mail to the address specified in the notice referred to in Paragraph 1 hereof, or to any different address subsequently furnished to the Company in writing. A former hostess whose name is on

the preferential hiring list shall not be entitled to preference in re-employment and shall forfeit her seniority with the Company and the Company shall have no liability whatsoever to such former hostess if she does not signify her intention to accept re-employment within ten (10) days after the date of the notice, and if she does not return to the service of the Company as a hostess on the date specified in the notice offering re-employment, which date shall not be less than fifteen (15) days after the date of such notice.

5. As a condition of re-employment, pursuant to Paragraph 4 hereof, such former hostess shall be required to pass a Company medical examination and to meet the Company's hostess qualifications as they existed on the date of her termination, including the prescribed weight standards.

6. If, on the date established for re-employment, such former hostess is pregnant, she shall be placed on a maternity leave of absence pursuant to the appropriate provisions of the TWA/ALSSA Working Agreement signed October 22, 1970. In such event seniority shall not begin to reaccrue until she returns from such maternity leave of absence.

Signed this 9th day of August, 1971

For Trans World Airlines, Inc.
/s/ David I. Crombie
Vice President, Industrial Relations
For Air Line Stewards and Stewardesses
Association
/s/ James F. Horst
International Executive Vice President

AIR LINES STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, et al., Plaintiffs-Appellees, and Equal Employment Opportunity Commission, Applicant for Intervention-Appellant,

v.

AMERICAN AIRLINES, INC., and Trans World Airlines, Inc., Defendants-Appellees.

Nos. 71-1614, 71-1615.

United States Court of Appeals.

Seventh Circuit.

January 18, 1972.

Before CUMMINGS, PELL, and STEVENS*, Circuit Judges.

CUMMINGS, Circuit Judge.

In these two class actions, the Union[1] and certain former stewardesses asserted that both defendant airlines had violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) by terminating stewardesses who had become pregnant. They sought reinstatement, back pay, and other relief. On June 1, 1970, the Union filed appropriate charges with the Equal Employment Opportunity Commission, and a month thereafter the Commission notified the Union that it was entitled to initiate civil actions in the district court in accordance with 42 U.S.C. § 2000e-5(e) and (f). These suits were filed a fortnight thereafter.

Although the district court initially refused to permit the Commission to participate as amicus curiae, in March 1971 it

* On the day following the oral argument, a fact which Judge Stevens deemed disqualifying came to his attention; he did not thereafter participate in this case.

[1] Airlines Stewards and Stewardesses Association, Local 550.

was granted leave to file an amicus brief in support of plaintiffs' motion for summary judgment and did so on April 30, 1971.

After our decision in Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir. 1971), certiorari denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 the parties entered into settlement negotiations resulting in July 14, 1971, memoranda of understanding. The two airlines agreed to place pregnancy-discharged stewardesses on a hiring list according to their seniority at the time of discharge (plus 90 days in the American Airlines case). Upon the occurrence of a vacancy, a stewardess would have ten days to accept reemployment on condition that she meet weight restrictions and other qualifications in effect at the time of her discharge. As the Commission notes, the proposed settlement did not entitle the stewardesses to immediate, unconditional reinstatement, full seniority from time of first hire, and back pay from date of discharge.

At a hearing on July 16, 1971, the district court entered orders permitting the suits to proceed as class actions, and permitting notice of the proposed settlement and an August 30, 1971, hearing thereon to be given to the stewardesses' class by publication in the union newspaper. A copy of the notice was also mailed to each stewardess at her last known address. On August 18 and 19, 1971, the airlines mailed copies of the proposed settlement to members of the class.

On August 5, 1971, the Commission sought to intervene as of right in both suits under Rule 24(a) of the Federal Rules of Civil Procedure. However, the motions to intervene were denied on August 11, 1971, on the ground that

> "These parties have always been fairly represented, they have been represented by competent counsel."

Thereupon the Commission appealed, and on August 25, we granted a stay pending resolution of the consolidated appeals.

[1] Rule 24(a) of the Federal Rules of Civil Procedure governs intervention of right. Clause 1 of that Rule permits

intervention when a statute of the United States confers an unconditional right to intervene. No such statute has yet been enacted as to the Commission[2]. Significantly, 3B Moore's Federal Practice ¶ 24.06[2] p. 24-94 (2d ed. 1969), notes that Congress has allowed the United States to intervene in various types of proceedings under the Civil Rights Act of 1964, but nothing is said about Commission intervention.

Clause 2 of Rule 24(a) also permits intervention of right "[1] when the applicant claims an interest relating to the property or transaction which is the subject of the action and [2] he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, [3] unless the applicant's interest is adequately represented by the interested parties." These three conditions have not been met.[3]

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[2] Upon his certification that the case is of general importance, the Attorney General is permitted to intervene as of right when a district court action has been commenced seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment on account of race, color, religion, or national origin. Section 902 (42 U.S.C. § 2000h-2).

[3] Appearing to recognize that the entire thrust of Title VII's procedural scheme militates against allowing the Commission are right to control the course of Title VII litigation, the Commission makes alternative arguments for "authority" to intervene where it meets the requirements of Rule 24(a)(2). On the basis of such cases as Securities and Exchange Comm. v. United States Realty & Improvement Co., 310 U.S. 434, 458-459, 60 S.Ct. 1044, 84 L.Ed. 1293; United States v. American Trucking Ass'ns. 310 U.S. 534, 541, 60 S.Ct. 1059, 84 L.Ed. 1345; All American Airways v. Village of Cedarhurst, 201 F.2d 273, 274-275 (2d Cir. 1952); West India Fruit & Steamship Co. v. Seatrain Lines, Inc., 170 F.2d 775 (2d Cir. 1948); and Teamsters Union, Local 542 v. Ace Enterprises, Inc., 332 F.Supp. 33, 38 (N.D.Cal. 1971), the Commission argues that as a federal agency it has inherent authority to intervene which can only be negated by an express statutory provision to the contrary. Alternatively the Commission relies for its authority to intervene on 42 U.S.C. § 2000h-3, which provides:

I. The Commission's Interest in the Subject Matter of the Action and Practical Impairment of its Interests.

In an attempt to satisfy the first condition, the Commission asserts that its interest in these cases is predicated on Section 706(i) of the Act, which provides:

> "In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e) of this section, the Commission may commence proceedings to compel compliance with such order." (42 U.S.C. § 2000e-5(i)).

Under this Section the Commission claims an interest both as the government agency empowered by Congress to enforce court orders and as the representative of the class on whose behalf these suits were brought. The Commission characterizes its interest as that of monitoring remedies in private Title VII cases to make certain that they vindicate the policies of the Act and afford appropriate relief. If this were the actual nature of the Commission's interest, it might be sufficiently related to a judicial proceeding approving a consent decree to justify intervention. However, the Commission's self-characterization is overstated.

Clearly Section 706(i) empowers the Commission to initiate court proceedings to compel compliance only when (1) a court order, coercive or consensual, has issued and (2) the subject of

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"Nothing in this Act shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General or of the United States or any agency or officer thereof under existing law to institute or intervene in any action or proceeding."

However, we do not resolve this controversy in terms of "authority" to intervene, for the Commission has not satisfied the conditions for intervention in Rule 24(a)(2). But see Braddy v. Southern Bell Telephone & Telegraph Co., No. 71-2172 (5th Cir., decided January 11, 1972), where the Commission was found devoid of such authority.

that order has failed to obey it.[4] This provision does not, as the Commission contends, charge it with responsibility in fashioning relief as opposed to determining the existence of a violation, and it does not "authorize[d] its participation in *all* suits brought by private individuals upon the entry of judgment in their favor." (Emphasis in Commission's main brief.)

When Congress provided for the intrusion of the Commission in Section 706(i), it did not make a dichotomy between establishing the underlying offense, from which the Commission was deliberately excluded,[5] and fashioning complainants' remedies. Here the Commission asserts that the proposed settlement violates the Act and that it affords narrower relief than would be awarded upon successful litigation.[6] This is simply the Commission's subjective assertion that conduct that will be permitted to the defendants is conduct violative of Title VII. Plainly the Commission cannot bring suit to establish that contention.[7] Since relief is always tailored to remedy the

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[4] See Note, Developments in the Law; Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L.Rev. 1109, 1236, 1248-1249 (1971).

[5] The Senate stripped the Commission of authority to bring suit in its own right after the House Committee on the Judiciary had divested it of its coercive enforcement powers. See Miller v. International Paper Co., 408 F.2d 283, 286 (5th Cir. 1969); Vass, Title VII: Legislative History, 7 B.C.Ind. & Com.L.Rev. 431, 450-452 (1966); Note, *supra* note 4, at 1196-1197 n. 8. An authority on the legislative history of Title VII had stated that when the Mansfield-Dirksen amendment stripped the Commission of its ability to initiate suit, the Commission was given power to recommend matters it felt deserved government action or intervention to the Attorney General and to advise and assist the Attorney General on such matters (42 U.S.C. § 2000e-4(f) (6)) as the *quid pro quo* to satisfy Congressional advocates of a "strong" EEOC with enforcement powers. Vass, *supra*, at 451-452.

[6] The Commission also complains that the settlement notice given to the members of the class was inadequate. See text *infra*.

[7] See 42 U.S.C. §§ 2000e-4(f), 2000e-5.

conduct found offensive, dissatisfaction with the court's appraisal of the conduct can always be articulated in terms of inadequacy of the relief afforded. Consequently, without subverting the manifest intent of Congress that only private litigants and the Attorney General may sue to establish an unfair employment practice,[8] we cannot accept the notion that Congress meant to invest in this Commission a participating interest in formulating Title VII remedies. Braddy v. Southern Bell Telephone & Telegraph Co., No. 71-2172 (5th Cir., decided January 11, 1972). Indeed, Section 706(i) embodies the judgment that Commission action against non-compliance with court orders will promote more scrupulous obedience, ensure against intimidation of successful plaintiffs' attempts to enforce court orders, and relieve private plaintiffs of the burden of a second action to secure the relief to which a first action found them entitled.

Section 706(i) does not authorize Commission participation in all suits as soon as judgment is rendered for plaintiffs. Simply stated, the interest afforded under Section 706(i) is the limited one of the ability to initiate contempt proceedings upon the defendant's failure to comply with the order of the trial court.[9] Failure to comply with the court's decree is the condition for Commission action under Section 706(i). Contumacious behavior is not something that can readily be assumed. Therefore, the Commission's legitimate interest under Section 706(i) is contingent and not direct, as required by Rule 24(a)(2). See Hobson v. Hansen, 41 F.R.D. 18, 24 (D.D.C.1968); 3B Moore's Federal Practice ¶ 24.09-1 [2] at 24-301 (2d ed. 1969).

What limited interest the Commission has under Section 706(i) is not practically impaired within Rule 24(a) (2) by

[8] See 42 U.S.C. §§ 2000e-5(e), 2000e-6(a); Note *supra* note 4 at 1196-1197, 1228.

[9] See Note *supra* note 4 at 1236, 1249; see also Equal Employment Opportunity Commission v. United Ass'n of J. & A. of Plumbing, Etc., 438 F.2d 408, 414 (6th Cir. 1971).

denying it rightful intervention. The Commission argues that without intervention it will find itself on the horns of a dilemma: it will be forced to choose between refusing to enforce a defective court order and enforcing an order which does not carry out the policies of the Act. However, we perceive no such dilemma. By the express terms of the statute the Commission simply cannot seek to enforce an order, defective or otherwise, unless it is disobeyed. The Commission's interest is in ensuring *compliance* with court orders, and that interest is not impaired by disallowing intervention in court proceedings to determine liability or award relief.

In its reply brief the Commission argues that an interest sufficient for intervention under Rule 24(a)(2) also emanates from Section 706(a) of the Act (42 U.S.C. § 2000e-5(a)) which requires the Commission upon a finding of reasonable cause to believe the Act is being violated, to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." The Commission further contends its interest in effective conciliation will be impaired by the *"stare decisis"* effect of a defective court order. First, the Commission does not have sufficient interest in the success of the conciliation negotiations in its own right to justify intervention. The real party in interest in conciliation endeavors is the employee alleged to have been discriminatorily treated. He is completely free to accept or reject the proposals of union or employer as well as the position taken by the Commission.[10] Second, even if we were to assume the Commission itself had a cognizable interest, the effect of what the Commission believes to be an erroneous court order cannot be said to impair significantly its negotiating position. While under the 1966 amendment of Rule 24 "*stare decisis* principles *may in some cases* supply the practical disadvantage that warrants intervention as of right" (Nuesse v. Camp, 128

[10] Cox v. United States Gypsum Co., 284 F.Supp. 74, 83-84 (N.D.Ind.1968), affirmed, 409 F.2d 289, 291 (7th Cir. 1969).

U.S.App. D.C. 172, 385 F.2d 694, 702 (D.C. Cir. 1967) (emphasis added); see Atlantis Development Corp. v. United States, 379 F.2d 819, 828-829 (5th Cir. 1967)), the possible effect of a consent decree on the Commission's future negotiating position is insufficient to constitute practical impairment within Rule 24(a)(2). The Commission is of course free to take a more stringent position in any future conciliation negotiations than that agreed upon by parties in previous litigation and approved in a consent decree. The recalcitrance of employers and unions based upon the decree of a single district court is speculative at best in view of the fact that the aggrieved employees are always able to bring suit. By comparison to the direct practical effect of a decision of one court on the intervenor's ability finally to prevail in another court present in *Nuesse* and *Atlantis, supra,* the possible influence of a court decision on negotiations whose result is not determinative of an issue is weak indeed.[11] Hence even assuming a cognizable interest, we cannot find a practical impairment which satisfies the second condition of Rule 24(a)(2). Cf. Edmundsen v. State of Nebraska, 383 F.2d 123, 127 (8th Cir. 1967); 3B Moore's Federal Practice ¶ 24.09-1 [3] at 24-314.

[11] In asserting that the consent decree will impede its conciliatory efforts in future cases, the Commission does not complain about the impairment technically worked by *stare decisis.* That principle is one of *judicial* respect for prior court resolutions of an issue, and the Commission's complaint is about the possible adverse influence on private parties' willingness to accede to its views in negotiations. A court cannot appraise this influence on private parties in the same way as it can assess the weight a court is likely to give a prior judicial decision. See Atlantis Development Corp. v. United States, 379 F.2d 818, 828-829 (5th Cir. 1967). The former must remain more conjectural. Moreover, *stare decisis* effect has not been generally held to be a sufficient impairment of interest. In *Atlantis,* and to a lesser extent in Nuesse v. Camp, 385 F.2d 694, 702 (D.C.Cir. 1967), there was a peculiar formidable difficulty which *stare decisis* would have worked under the circumstances. At best, the Commission has not asserted a comparable impairment.

II. The Adequacy of the Representation of the Commission's Interest.

The final condition of Rule 24(a)(2) for intervention as of right is that the applicant's interest is not adequately represented by existing parties. Insofar as the Commission purports to represent the interests of the class of stewardesses, the district court concluded, and we think legitimately, that the parties were all fairly represented by competent counsel. The involvement of the stewardesses' own counsel justifies the assumption that their interests were adequately protected in the settlement agreement, even if the Commission's views differ.[12]

Insofar as the Commission purports to represent the public interest generally, the scheme of Title VII shows a legislative judgment that the public weal in such litigation was to be directly represented by the private suitor and, in some cases, by the Attorney General. By placing primary enforcement responsibility in the hands of the private litigant, specifically endowing his action with public interest characteristics,[13] Congress largely equated the public interest in this kind of litigation with the efforts private parties are willing to expend to vindicate their Title VII rights.[14] See Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401, 88 S.C. 964, 19 L.Ed.2d 1263. When the general societal interests cannot be adequately represented by private suitors, the Attorney General may seek to intervene in private suits or file a pattern and practice suit (42 U.S.C. §§ 2000e-5(e) and 2000e-6(a)), and the Commission may refer matters to the Justice Department with such recommenda-

[12] See Note, *supra* note 4 at 1250.

[13] See *id.* at 1197.

[14] Even when a private party has not filed a charge and the Commission discovers discriminatory practices on its own and starts conciliation proceedings through the device of the Commissioner charge (42 U.S.C. § 2000e-5(a)), it cannot bring suit, but must either find a private party who will file a complaint or persuade the Attorney General to take action. 42 U.S.C. §§ 2000e-5(a), 2000e-4(f)(6). See Note, *supra* note 4 at 1238.

tion (42 U.S.C. § 2000e-4(f)(6)).[15] But the structure of Title VII is the unmistakable product of Congressional judgment that absent the participation of the Attorney General, the public interest is served by leaving the conduct of litigation to vindicate Title VII rights exclusively in the hands of private suitors.[16] Intervention as of right would substantially diminish the rights of the original parties to control the litigation. 3B Moore's Federal Practice ¶ 24.09-1[i] at 24-285.

> "Although [the Commission] is entrusted with important and sensitive responsibilities of investigation and conciliation, it was not intended by Congress to pre-empt the ultimate rights of the claimant, the person the Act was designed to protect." Fekete v. United States Steel Corp., 424 F.2d 331, 336 (3d Cir. 1970).

Thus the public interest the Commission claims generally to represent is adequately served, by force of legislative judgment, through the efforts of private litigants in these actions under the vigilant protection of the court.[17] Where the Commission asserts interests peculiar to its specific public responsibility

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[15] See note 5 *supra*. We were advised at the oral argument that the Commission did not recommend the Attorney General's intervention in these two cases, and he has not intervened. United States v. United Brotherhood of Carpenters and Joiners of America, Local 169, 457 F.2d 210 (7th Cir. No. 71-1389, decided January 4, 1972).

[16] See Note, *supra* note 4 at 1239.

[17] Because of the unsophisticated character of many Title VII plaintiffs and because of the possibilities of less than diligent efforts by some representative plaintiffs, the courts have a weighty responsibility in the public interest to interpret meaningfully the technical provisions of the Act and assure that conduct and results of the litigation are fair to all aggrieved members of the plaintiff class. See Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1201 (7th Cir. 1971), certiorari denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543; Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 428-429 (8th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969).

roles, but interests insufficient to justify intervention as of right, possibly it may seek permissive intervention under Rule 24(b) or it may seek leave to appear as amicus curiae.[18]

Whether it was wise or improvident in the public interest to exclude the Commission from control of the litigation is not our concern. However, the claims the Commission makes here do not exemplify improvidence. Toward this end we have examined the Commission's claims even though the Commission is not actually entitled to raise them.

The Commission claims that the settlement notice was incomplete and misleading. Rule 23(e) of the Federal Rules of Civil Procedure requires that notice be given to the members of a class before their action is dismissed or compromised. The notice required by the Rule must fairly apprise the members of the class of the proposed compromise and of the options open to dissenting class members in connection with the proceedings. Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp., 323 F.Supp. 364, 378 (E.D.Pa.1970); see Advisory Committee's Note on the Proposed Rules of Civil Procedure, 39 F.R.D. 69, 107 (1966). Here the notice of the settlement hearing on the Agreement of Compromise and Settlement was published in the Union newspaper more than thirty days before the hearing. The Union mailed a copy of the notice to the 72 members of the class it had listed more than thirty days before the hearing, and the defendants respectively mailed a copy of the notice to all members of their plaintiff classes thirty days and three weeks before the hearing. The notice summarized the proceedings to date, informed the class members of the significance of judicial approval of the proposed agreement, told the class members that the agreement provided for their being placed on a "preferential hiring list"

[18] See Note, *supra* note 4 at 1239. According to the airlines' brief, the parties do not object to the Commission's appearing amicus curiae in these cases.

subject to their acceptance, and informed would-be dissenters that they might appear in person or by counsel to register their objections and present evidence in support thereof. When the memoranda of understanding were finalized, all class members were mailed a copy of the proposed agreements approximately ten days before the hearing date.

While the Commission has suggested that the manner of communicating the information and its content could have been improved, we conclude that the notice sufficiently conveyed the required information and afforded a reasonable time for those interested to make their appearance with due regard to the practicalities and peculiarities of the case, thus satisfying the demands of due process. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313-314, 70 S.Ct. 652, 94 L.Ed. 865.

Additionally, the Commission attacks the weight restrictions in the settlement agreements as violative of Title VII. However, weight restrictions have not been put in issue in these lawsuits. Their validity is being resolved in litigation elsewhere.[19] We agree with the Union that this pregnancy class should not be barred reemployment under the settlement negotiations while the weight question is still unresolved. In fact, the Commission's effort to defeat these settlements because of the weight restrictions supports the denial of intervention below. Cf. United States v. Automobile Manufacturers Ass'n, 307 F.Supp. 617, 619-620 (C.D.Cal.1969), affirmed, 397 U.S. 248, 90 S.Ct. 1105, 25 L.Ed.2d 280.

Finally, the Commission asserts that the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated. This is precisely the sort of gratuitous opinion that the parties are entitled not to have foisted upon them under the scheme of Title VII. Suffice it

[19] See Maguire et al. v. Trans World Airlines, 70 Civ. 3947 (S.D.N.Y.).

to say that as a general proposition the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. This is especially true within the confines of Title VII where "there is great emphasis * * * on private settlement and the elimination of unfair practices without litigation." Oatis v. Crown Zellerbach Corp., 398 F. 2d 496, 498 (5th Cir. 1968). See Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969).

The orders of the district court denying the Commission's motion to intervene of right are affirmed, our stay order of August 25, 1971, is dissolved, and both causes are remanded for further consideration.

* * (Caption—Nos. 70 C 2069, 70 C 2071) * *

Report of proceedings had in the above-entitled cause before the Honorable J. Sam Perry, Senior Judge of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, March 10, 1972, commencing at two o'clock p.m.

Present:

Messrs. Kleiman, Cornfield & Feldman (10 South La Salle Street, Suite 452, Chicago, Illinois 60603), by Mr. Gilbert Feldman, appeared for the plaintiffs;

[2] Messrs. Gardner, Carton, Douglas, Chilgren & Waud (One First National Plaza, Chicago, Illinois 60670), by Mr. Laurence A. Carton and Mr. Joseph P. Carr, appeared for the defendants;

Messrs. Bell, Boyd, Lloyd, Haddad & Burns (135 South La Salle Street, Chicago, Illinois 60603), by Mr. D. Sidney Condit, appeared for respondent Kathryn Kridel;

Messrs. Pressman & Hartunian (134 North La Salle Street, Chicago, Illinois 60602), by Mr. Charles Pressman, and Mr. Arnold I. Shure (11 South La Salle Street, Room 2700, Chicago, Illinois 60603), appeared for respondent Ann B. Zipes;

Messrs. Mintz, Raskin & Lewis (100 North La Salle Street, Suite 2510, Chicago, Illinois 60602), by Mr. Robert A. Romanoff and Mr. Mahendra R. Mehta (188 West Randolph Street, Suite 1325, Chicago, Illinois 60601), appeared for respondent Kathy Comer;

[3] Messrs. Steinberg, Polacek & Steinberg (33 North La Salle Street, 34th Floor, Chicago, Illinois 60602), by Mr. Bradley D. Steinberg, and Messrs. Bailis & Hoyt (221 North La Salle, Suite 1063, Chicago, Illinois 60601), by Mr. Ronald S. Bailis, appeared for respondent Darlene Preston and certain other named plaintiffs in case Number 72 C 498;

Messrs. Anderson, Letlund & Tockman (619 South Bonnie Brae, Los Angeles, California), by Mr. Earl Tockman, appeared for respondents Bonnie Pulskamp, Susan Prasciunas, Marcia Jimerson, Phyllis Dill, Elizabeth Korengold, and Carol Rossi;

Mr. Matthew L. Salita (69 West Washington Street, Suite 2828, Chicago, Illinois 60602), appeared for respondent Bonita Ray White;

Mr. Irving M. Miller and Mr. John I. Goemaat (219 South Dearborn, Room 1836, Chicago, Illinois 60604), appeared amicus curiae for the Equal Employment Opportunity Commission.

[4] The Clerk: 70 C 2069, Airline Stewardesses versus American Airlines, et al., for a hearing.

Mr. Feldman: Good afternoon, your Honor.

Mr. Shure: With that, your Honor, I believe there is a consolidated case. Is it consolidated?

Mr. Feldman: Yes, your Honor, the cases are consolidated.

Mr. Shure: The other case is Airline Stewardesses, et al., versus Trans World Airlines.

The Court: Mr. Clerk, call it also for the record, consolidated with.

The Clerk: 70 C 2071, Airline Stewardesses versus Trans World Airlines, Inc.

* * * *

PATRICIA A. SANTINI, called as a witness on behalf of the objecting plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Pressman

Q. Would you state your name, address, and age?

A. My name is Patricia A. Santini. I live at 16 Strawberry Circle, Mill Valley, California, [112] and my age is thirty.

Q. Are you married?

A. Yes, sir.

Q. Your husband's name?

A. Robert Allen.

Q. Do you have any children?

A. Two.

Q. What are their names and ages?

A. David, he's two and three-fourths years of age; and Jeffrey, which is a year and a half.

Q. Are you a named plaintiff in this case?

A. Yes, I am.

Q. Were you employed by TWA?

A. Yes, I was.

Q. When did you commence your employment with TWA?

A. June 11 of 1962.

Q. When were you married?

A. June 16, 1967 and June 20, 1967; we were married twice.

Q. When did you leave the employ of TWA?

A. December 11, 1968.

Q. What were the circumstances of your leaving that employ?

[113] A. Pregnancy, I was forced to submit my resignation to the company because I was pregnant.

Q. Tell the Court how that happened, please. Did you do it by note, verbally, or what?

The Court: He wants to know how did your discharge take place?

The Witness: I sent the company a letter stating to them that due to the company policy, I was to be terminated because of pregnancy.

By Mr. Pressman:

Q. Was there a response to that?

A. Well, I received a black and white typewritten letter from the company which coldly told me I was terminated. I received no verbal recognition from them whatsoever.

Q. In your work with TWA, had you received any awards?

A. Yes, and they have a yearly hostess of the month contest between the girls,—

Mr. Feldman: Your Honor, I object.

The Court: Will counsel stipulate to her qualifications?

Mr. Feldman: Let's stipulate they are all excellent stewardesses in one way or another.

[114] The Court: That is not in issue. We presume each one of them, unless it is to the contrary shown, are all qualified.

Mr. Pressman: Your Honor, it could be an issue in determining whether they may be entitled to seniority, back pay and all that sort of thing, in bargaining. That is the only reason I bring it up.

Can I offer these? Mark them and offer them?

The Court: Mark them as a group exhibit and they will be admitted.

Mr. Pressman: Could you?

(The documents were thereupon marked Respondent Santini Group Exhibit A for identification.)

The Court: You may proceed.

By Mr. Pressman:

Q. Were you employed following your termination with TWA?

A. No.

The Court: Did you seek reemployment from them?

The Witness: Yes, sir.

[115] The Court: You were refused?

The Witness: Yes, sir.

The Court: Did you seek reemployment from other airlines?

The Witness: I am not interested in other airlines.

The Court: You did not, then?

The Witness: No.

By Mr. Pressman:

Q. How many times did you seek employment with TWA?

A. In January I went to the unemployment office in San Francisco and filed an application, and then the baby was born. Then shortly after the baby was born, I went back in November and December and was once again told there was no openings or positions available.

In the meantime, I was making phone calls to the airport to see what was available.

Q. Did you also apply for a job on the ground?

A. Yes.

Q. Did they reject you for that?

A. I never heard anything from them.

Q. But you filled out an application?

[116] A. Right.

• • • •

[219]

Cross Examination by Mr. Feldman of Darlene Preston:

Q. Before sending those documents out, or since, I want to know whether you or your lawyers have evaluated this question: The Company may raise the question if individual cases are heard with respect to those stewardesses who were terminated much before you as to whether or not the statute of limitations bars their right to this Court, and if—

Mr. Salita: I would object on the basis that she does not know—

The Court: Let him finish his question. I do not know what his question is yet.

By Mr. Feldman:

Q. There is a possibility that hasn't been ruled upon by the Court, that those people who did not within ninety days do anything might not be entitled to relief in this court if the settlement agreement [220] is not accepted.

Now, have you considered that possibility in terms of evaluating this situation?

A. No.

Q. Have your lawyers brought that possibility to your attention?

Mr. Salita: Just a moment. I would like to lodge an objection on the basis that he asked her how she felt, and if her lawyers knew this.

The Court: Well, not if they knew it, but if they called it to her attention.

Mr. Salita: Fine. I would ask that that portion of the question be stricken.

The Court: No, so far as if they knew it is concerned, but if they called it to her attention, or if it was discussed with her and whether she took it into consideration, she may answer. She may answer whether it has been taken into consideration by her.

Mr. Bailis: Your Honor, we would like to object also with respect to conversations between counsel and Miss Preston regarding it.

The Court: You open it up and waive it when you come in here specially and make your objections and enter an appearance, for the purpose [221] here, and want to open up her prior counsel's conversations. There has been no question about waiving conversations between her and Mr. Feldman when he was her attorney. She has waived all that right by coming in here under the circumstances.

Overruled.

Mr. Bailis: Your Honor, I believe that—

The Court: I have overruled on it, and let's do not waste any time. I have ruled on it, and let's have the answer to the question. It is very material, whether she knows all of these facts or not, and whether they were brought to her attention. It's important for me to know about it.

By the Witness:

A. No. Well, for all this time that I have been contacting the girls and mailing out those affidavits I didn't feel that I had any legal representation.

By Mr. Feldman:

Q. So, is the answer that you did not know that this was a fact that should be taken into consideration?

A. No, I did not know.

[222] Mr. Pressman: Excuse me just a moment. I would like to register an objection because it is based upon the assumption that this is indeed a factor that should have been taken into consideration. This is a matter of expert testimony.

The Court: That is a matter for me to find, and I think he has the right to inquire about it. It is whether or not this is a fair settlement, whether or not a full consideration has been given as to whether or not it should be accepted, and what the risks are, whether or not she knows all those risks. That is something to be gone into.

Objection overruled. The answer may stand.

* * * *

[288]

Cross-Examination by Mr. Pressman of Mr. Feldman

What it ultimately led to [289] was the two letters you have, one to American and one to TWA, being sent out. They were

sent out to some other carriers, too, in order to indicate what our position was to the companies and see if the matter could be rectified.

Q. What did the demand letter that was sent out ask for?

A. We had a number of pending pregnancy cases. It asked the company to obey the law as we understood the law to be, and not terminate people for pregnancy.

Q. Did it ask for anything more?

A. I don't think so. I don't remember. You would have to show me.

Q. It did not ask for money damages, did it?

A. Oh, I don't think that really would have been material at that time. You must realize that there were a number—the Darlene Preston case was fresh. She had just been discharged, she had just had her baby. We knew at that time of nothing except the Hillgruber and Charest case, which was pending in Los Angeles. Ninety-five percent of the members of these classes who had been terminated from 1965 on had never said boo. They had never made any protest to the Union or, as far as I know, to anybody else about their dis- [290] charges. We had a couple of live cases, Darlene Preston being the principal one, that raised the issue.

* * * *

[303]

Q. But, is it not usual that in bargaining situations to measure out what one fellow gives up and what the other fellow gets, and perhaps if he does not give up much we can get more, and so on?

A. Yes.

Q. You do that every day; that is your business?

A. We had to balance two things. One was including the entire class, and the other was money damages. I was so

concerned with the potentiality that 90 percent of this class may be entitled to nothing, no [304] reinstatement, no wages, nothing, that it was imperative that I get the entire class included in the settlement agreement, because I did not want to face the situation of going back to people who had quit in 1965 and 1966 and who had not said a word until the Union filed a lawsuit, until after the Union filed a lawsuit, and then have to litigate the question of whether or not they were entitled to settlement.

* * * *

[313]

Q. It was a real surrender of some rights, was it not, on the part of the members of this class?

A. It was a compromise, Mr. Pressman, in the judgment of the Union.

Q. It was a surrender of the right to substantial [314] moneys, was it not?

Mr. Carr: If your Honor please, there is no right to substantial moneys until there has been a determination of liability.

The Court: That is correct, but he can ask him the question.

By the Witness:

A. If they won the lawsuit and as an individual were held by the Court to be entitled to full benefits, obviously they would receive benefits which they are not receiving under the settlement agreement.

By Mr. Pressman:

Q. Which would amount to millions of dollars, would it not?

A. It might or might not, Mr. Pressman. As I told you, I was very concerned of the statute of limitations problem which could cut out over 90 percent of the members of this class, that has never been litigated. So, I don't know how much money or how many people might ultimately benefit. I only know that

there were legal problems which I had to evaluate when reaching the settlement agreement.

The Court: Offhand can you tell me what the statute of limitations was that you refer to?

[315] The Witness: There is a 90-day period of time from the incident of discrimination in which you have to file with the EEOC.

Now, it has been held in some cases that if one person files with the EEOC, that person can file a class action without all of the others going through the EEOC. But, to the best of my knowledge those were in continuing violation situations, unlike the present one, where you have people who were terminated and for five, six years may have done nothing. I do not know that those people would be properly included in the class, should the company ultimately raise the defense, and this concerned me.

By Mr. Pressman:

Q. The Cox case is the case you pointed out in the 7th Circuit, is it not?

A. The what case?

Q. Cox.

A. I don't recall the case by name.

Q. This was, in fact, a continuing violation, was it not?

A. I don't know. When they terminated—

Q. Why don't you know?

A. It would be an argument. They terminated [316] some people, or people resigned in '65 and '66. Those people did nothing up until the time when we created a class action by this litigation. I, frankly, as a lawyer just don't know what their rights would be, and it bothered me.

Q. Mr. Feldman, was there not a twofold violation on the part of the company here, both firing because of pregnancy and the refusal to hire?

A. I don't know that they made an application to hire in the various situations. I know that the situations fall into various categories. Some were terminated. They were terminated for different reasons. Some resigned. Some were given no reason at all. Some may have applied for reinstatement and some may not have. They fall into these various categories, and I don't know how many people fall into various categories. I have not tried to ascertain that.

Q. Mr. Feldman, is it not the duty of an attorney representing a class, or a person, where there is a possibility of a defense like statute of limitations, to investigate that defense, find out what the facts are, and make a judgment as to whether or not that defense would apply?

A. In this situation?

[317] Q. Yes.

A. I think it was almost impossible for me. In fact, I'll say it was impossible for me to go through every single one of the seven to eight hundred cases to make a determination without getting a court order making the information, documentation available, and frankly I saw no reason to do so. It wouldn't have altered my judgment.

Q. Did you ever ask for a court order?

A. We never reached that point in the litigation.

Q. In other words, if you had found that there was no statute of limitations defense, it would not have altered your judgment?

A. The primary consideration in my mind—what I am giving you admittedly are secondary considerations and those are the legal problems which could be contemplated in the lawsuit—the primary consideration in my mind when I made

the recommendations to the Union was the period of time that would be entailed in this litigation, and the fact that when stewardesses generally turn over so quickly, a year and a half, two years, there would be a lot of people who would want to fly who, even if ultimately [318] successful, if we litigated for five years, would have been deprived of the opportunity, and in my judgment those people should have been and were, in fact, given first priority.

* * * *

Argument of Mr. Shure

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[458]

The other reason he gave as to why he was convinced he ought to settle the case was because of the statute of limitations. This is really a novel theory, your Honor. What he is saying there [459] is that because the statute of limitations may have run against someone or some one hundred or two hundred people in the class—which they say is about 350 people—nobody in the class should get any back pay and all these people, regardless of whether they can return to work or not, those people who have been fired because of a violation of their civil rights, they will get not one red cent even if the statute of limitations hasn't run.

Now, how can we barter off in a case like this, and I can't understand counsel's reasoning for throwing out the baby with the bath. If some of the people are going to be thrown out, it is unfortunate. That is what happens in lawsuits. Sometimes you get stuck with something like that, but that doesn't mean that every single employee who has back pay coming should lose that, plus her seniority rights, and have that bartered away for what? So that TWA didn't have to pay a cent in back pay. So that TWA didn't have to lay off a single girl who is now working, and the Union could keep every dues-paying member on the payroll while my people sit in the background and wait for a job to open up, whether it is sooner or later, and if it does open up, who knows that when there is [460] a recession or something that they are not going to get laid off again?

* * * *

Argument of Mr. Feldman

* * * *

[516]

I was also concerned about the statute of limitations, as I have indicated, and contrary to Mr. Shure's statement, we are not talking about a few people.

[517] I am talking about people who were terminated and did nothing prior to the time Darlene Preston triggered everything that is happening, and that is most of the group.

Also, you must appreciate that as to most of these people there is no record of termination by the company. It is a resignation without any indication that I know of of a complaint. In some cases there may not be a complaint to the company and—

* * * *

Argument of Mr. Carr

* * * *

[545]

Mr. Carr: All of these girls, as I say, want to go back to work, and here are girls as to whom there is a great deal of doubt, as to whether or not—Mr. Feldman has estimated that 90 per cent would have a right to go back to work, and incidentally, we have been prepared, if we ever got to the issue, to raise these points on the particular girls.

Many of these girls have slept for five or six years on their rights, without ever doing anything about them. Mr. Feldman said there is a question as to 90 per cent of them having a right to go back to work.

We have agreed that all these girls, all these girls who were terminated, whether by resignation or involuntarily, may go back to work.

The Court: In other words, you are waiving any question of statute of limitations, if there is one?

Mr. Carr: That is correct. Furthermore, we have made a concession that they can choose the [546] base from which

they can operate. In the case of a married girl, this is an important concession. In addition, we are giving them the full seniority they left with, and that is what the girls under the present leave of absence agreement have. They do not come back with seniority for the time they were off. They come back with seniority as of the time they left.

Now, this seniority need not have been given to them at all on a settlement agreement, but they were given the full seniority they had earned, and this was, as Mr. Feldman pointed out, in derogation of those girls who are presently flying.

* * * *

Argument of Mr. Shure, resumed

* * * *

[566]

Mr. Feldman says that Mr. Shure says that only a few people would be affected by the statute of limitations in this case. That is not what I said, and I would like to correct it.

My statement was, let us assume for the purpose of argument that one hundred people or even two hundred people are barred by the statute of limitations out of the 350 names in the class which were supplied by TWA.

I am assuming that a majority of the people would have no rights, just for the purpose arguendo of this particular point. I made that [567] concession arguendo, but he picks it up and says that I only say a few people, and then he contests the point that I did not make.

If two hundred out of three hundred and fifty is not more than a majority, I am sadly mistaken, but I say, even conceding all that, even if there were one person or ten persons, you cannot take away the civil rights and the right to be made whole from any of these people, just because they happen to be a minority. That is what the laws are for, to protect the minority. The majority usually gets what it wants.

Short Rec. No. 2

* * (Caption—No. 70 C 2071) * *

JUDGMENT ORDER

(Entered March 17, 1972)

On this 17th day of March, 1972, the above entitled action having come on regularly to be heard, pursuant to the order entered herein dated February 3, 1972, upon an Agreement of Compromise and Settlement (the "Agreement") and it appearing that due notice of said hearing was given in accordance with the aforesaid order, and all parties having appeared by their attorneys of record, the Court having considered both the Agreement and statements and affidavits in opposition thereto by some members of the class and their counsel, and an opportunity to be heard having been given to all interested persons desiring to be heard:

It is ordered, adjudged and decreed that:

1. The Court has jurisdiction over the subject matter of this action and the parties hereto, including all former hostesses who were removed from the payroll of defendant between July 2, 1965, and July 31, 1969, because of pregnancy. They are the members of the class. Plaintiffs are adequate representations and have adequately represented them. The prosecution of this action as a class action is found to have been proper for all purposes of these proceedings. This action is a Rule 23 (b) (2) class action. This judgment is binding upon and adjudicates the rights of the members of the class with respect to all claims or causes of action arising out of, under, or in connection with any matter or transaction referred to or suggested by the complaint.

2. On February 8, 1972, notice of the hearing and a copy of the memorandum of understanding attached to the Agreement was mailed to each member of the class at her last known address, and on February 25, 1972, a supplemental notice was so mailed which stated that any member of the class may show cause why this lawsuit brought under Rule 23 (b) (2) of the

Federal Rules of Civil Procedure should not be adjudicated to be a Rule 23 (b) (2) class action, and the Court finds that due and adequate notice of the hearing has been given and full opportunity to be heard has been afforded to all parties and persons in interest.

3. The Court has examined and approves and hereby incorporates for all purposes and makes a part of this judgment the Agreement, which is attached in its entirety hereto as Exhibit A, and which was entered into by and between the parties to this action on July 14, 1971, including the Memorandum of Understanding attached thereto. The Agreement was arrived at fairly and in good faith and is found to be fair, reasonable and adequate for all parties and for all members of the class. The parties hereto are ordered and directed to implement the Agreement.

4. This judgment order and the Agreement shall not constitute any evidence or admission by the defendant that any unlawful act has been committed, and shall not be deemed to create any inference that there is any liability therefor. Defendant does not admit, either expressly or by implication, that it is subject to any liability whatsoever by reason of any of the matters complained of in this action and, on the contrary, expressly denies and disputes the existence of any such liability.

5. This action is hereby dismissed on the merits and with prejudice as against the defendant, its personal representatives, subsidiaries, past and present officers, directors, shareholders, employees and agents, and all of them are hereby discharged from any and all liability, claims, demands, or causes of action in law or in equity, arising under federal, state or local law, alleged or which could have been alleged in the complaint, and all claims or causes of action as to all members of the class arising or which may arise out of, under, or in connection with any matter or transaction referred to or suggested by the complaint in this action. This judgment shall be final and conclusive with respect thereto.

6. Jurisdiction is retained for the purpose of enabling any party to this final judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or implementation of the provisions of this final judgment and of the provisions of the Agreement.

ENTER:
/s/ J. S. Perry
Judge

Appendix No. 72-1335

LETTER TO TWA AND AMERICAN CLASSES REPORTING ON OUTCOME OF ACTIONS IN DISTRICT COURT (MARCH 20, 1972).

(Letterhead of Air Line Stewards and Stewardesses Association)

March 20, 1972

Report To ALSSA—TWU Representatives
And Members Of The Class Action
ALSSA Pregnancy Suit—American And
Trans World Airlines

Federal Judge Joseph Sam Perry has found "fair and adequate" the settlement agreements negotiated by ALSSA with TWA and American, and which provide for reinstatement of stewardesses and hostesses who were removed from the payroll because of pregnancy between the enactment of the Civil Rights Act and the signing of contract pregnancy agreements. After five days of hearings and arguments, Judge Perry, on March 17, upheld and approved the settlements between the Union and the two carriers. Strongly commending ALSSA for having achieved these most favorable agreements, the Federal Judge announced that, had ALSSA elected to litigate to a conclusion the pregnancy suits rather than effectuating the settlements, he would have ruled in favor of the two carriers because he did not consider the termination of stewardesses and hostesses for pregnancy to be violative of the Civil Rights Act.

This pronouncement from the Federal Court Judge, that the law suit would have been a losing one had he adjudged it on the merits, left members of the pregnancy class who objected to the ALSSA settlement, and their attorneys, who were in the courtroom visibly shaken and stunned. For they had steadfastly assumed, during the hearings, that it was an implicit legal certainty that the carriers had violated the law and that victory was assured if only the Union had not settled. Exemplifying

this attitude, which was consistently maintained during the hearings, was the declaration of one of the Attorneys for the objecting pregnancy class members that the suit involved nothing more than counting up the damages. Hence, the objecting members had insisted that any settlement short of total victory was a "sell out" by the Union. In addition, written communications to members of the class had been sent out by an objecting hostess and an objecting stewardess, in violation of the Court rules, in which it was flatly stated that the carriers could have no defense. This fallacious overconfidence was due in part to the fact that it was the same Judge Perry who had ruled in a recent United Air Lines case that termination of women only for marriage did violate the law. But, stated Judge Perry, when approving the ALSSA settlements, "pregnancy is different from marriage".

ALSSA President J. D. Preston, upon hearing the Court's ruling, commented that "ALSSA certainly has been vindicated. Once again, collective bargaining has proved to be the most effective way of achieving ALSSA's goals." Preston added that "collective bargaining has been the tool which in a few short years has changed the homogenous character of the cabin crew which so recently was limited to young, unmarried girls." Preston referred to those who, although well-intentioned, were so emotionally absorbed in their own individual problems or objectives that they could not maintain any perspective over the larger picture. He mentioned the EEOC intervention which had delayed the pregnancy case one-half year by an unsuccessful attempt to block the settlement agreements, the EEOC having been roundly criticized for its conduct by both Judge Perry and the United States Court of Appeals. Preston also made reference to a few overly exuberant members of the pregnancy class who had been sending in hate mail and accusing the Union of everything from a sellout to taking bribes from the companies. Preston stated that "although I deeply sympathize with these ladies in their plight as victims in this situation, that sort of thing is unwarranted, unfair and uncalled for, particu-

larly in view of the fact that ALSSA has been the premier organization in eliminating all types of discrimination in this country.

Preston also warned that: "Judge Perry's interpretation of the law should not be taken by any carrier as sanction for discriminatory treatment to our members."

During the hearings before Judge Perry, ALSSA's attorney testified at length in support of the ALSSA settlement agreements.[6] He stated that, in his opinion, the termination of the pregnancy class by the carriers was violative of the law, but that honest differences of opinion existed on this question between him and the renowned lawyers for the carriers, for whom he had great professional respect. The problem facing the Union was that no one would know the answer for certain until the issue was decided by the United States Supreme Court, and the various appeals involved could entail at least five years. In the meantime, even assuming ultimate success, change in life circumstances could effectively deny members of the pregnancy class the benefits of the right to reinstatement which might ultimately be obtained.

But, the ALSSA Attorney continued, a victory on the question of whether termination for pregnancy was illegal could well prove to be only illusory for the individual stewardesses and hostesses for a variety of reasons which he detailed in his testimony and which are summarized below:

(1) Time limits are contained in the Civil Rights Act requiring that a charge "shall be filed within ninety days after the alleged unlawful employment practice occurred." Since an estimated 90% of the members of the pregnancy class had been terminated long before ALSSA filed a charge in 1970 at the request of some members of the class who had then just been terminated, the claims of practically the entire class might be held to be untimely and barred in their entirety.

(2) Due to husbands' jobs and family locations, it could be anticipated that many of the pregnancy class members would be unable to return to their former bases; hence the right to do so, if obtained by court order, might prove to be meaningless. For this reason, the settlement agreements allow for a choice of bases by the returning pregnancy class members.

(3) The Civil Rights law specifies that "No order of the Court shall require the . . . reinstatement . . . of an individual as an employee, or *the payment to him of any back pay,* if such individual was . . . discharged for any reason other than discrimination on account of . . . sex." In a significant number of the individual cases, the carriers are maintaining that the termination was for dishonesty in concealing and failing to report pregnancy rather than for pregnancy itself. Two of the principal members of the American class who were protesting the settlement testified that they flew seven months while pregnant before being terminated. One of them was not only protesting on her own but had been issuing written communications (in violation of the Rules of the Federal Court) to the other members of the American class urging and advising them on how to defeat the settlement. In addition, she had retained lawyers and had been communicating with the EEOC about her protests. The ALSSA Attorney asked her on cross examination; (a) Has anyone advised you that your having flown for seven months of pregnancy prior to notifying the Company of your pregnancy could conceivably defeat your claim entirely? (b) Has anyone advised you of any of the other potential infirmities to these claims? (Which the ALSSA Attorney was elaborating on in his testimony.) (c) Have you given any consideration to these potential problems before arriving at your decision to protest the settlement? Her answer to each of these three questions was "no."

(4) The Civil Rights Law specifies that "the court, in its discretion, may allow the *prevailing party* . . . a reasonable Attorney's fee as part of the costs. . . ." Stated otherwise the

losing party or parties may be ordered to pay the Attorney's fees of the winning party. No effort was made to ascertain or compute the amount of the Attorney's fee to which the carriers' counsel would be entitled should the carriers have turned out to be the "prevailing party." Suffice it to say that Corporate Attorneys are generally known to charge significantly higher fees than Labor Union Attorneys. This statutory provision was emphasized in the hearings because the communications that had been sent to members of the class by a stewardess and a hostess, in violation of the rules of Court, had flatly stated that objecting class members would have no responsibility for legal fees.

(5) The Civil Rights Law provides that if the employer is found to have violated the law, "the Court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include reinstatement ... of employees, *with or without* back pay. ... Interim earnings or *amounts earnable with reasonable diligence* by the persons discriminated against *shall* operate to reduce back pay otherwise allowable." The ALSSA Attorney raised the question as to whether those women who, for example, had spent the last several years unemployed and at home raising their infants were being realistic in their expectation that full or any back pay would be awarded them pursuant to the statutory language quoted above.

(6) The ALSSA Attorney expressed further concern over the fact that a significant number of the individual cases involved resignations rather than discharges. The question of whether they were voluntary or coerced might be difficult to prove. He contemplated over the problem of proof facing a woman who resigned in 1966, never officiallly protested to the carrier, never filed a grievance with ALSSA, never filed a charge with the EEOC and was not heard from until recently when she became apprised that ALSSA had sued on her behalf. How, asked the

ALSSA Attorney, is that woman going to sustain her burden and establish that she was "discharged" because of pregnancy? These matters as well as the primary objective of effectuating reinstatement of the pregnancy group as quickly as possible were among the factors which militated in favor of the settlement agreement. And this was of course without the benefit of the knowledge that the Judge could, if the case had been tried, deny any relief whatsoever, because, in his view, the carriers had not violated the law when terminating for pregnancy. The ALSSA Attorney concluded his testimony urging that the members of the class calm down, control their justified indignation and exercise caution and prudent judgment in the consideration and evaluation of the settlement agreements and these potential obstacles to the law suit which would have existed in the event there had been no settlement agreements.

During the hearings before Judge Perry, much attention was devoted to the already mentioned written communications with questionnaires that had been sent to members of the pregnancy class eliciting opposition to the settlements by a TWA hostess and an American stewardess in direct violation of a rule of the Federal District Court which prohibits any such communications to members of the class "until such time as an Order may be entered by the Court approving the communication". It is because of this rule that neither ALSSA nor its Attorney up until now have attempted any communication with members of the class without the communication having prior Court approval. The contents of the communications sent out by the hostess and stewardess were misinformative, fallacious and inflamatory (sic); yet ALSSA could not respond to them until now because any such comment would have been in derogation of the court rule. In conformity with the court rule, ALSSA reserved its position, explanation and justification of the settlement agreement for the open court hearing.

Additionally, when Judge Perry was considering the appropriate form of notice of the settlement hearings, the question of whether questionnaires should be submitted to the class prior to

the hearing on the settlement agreements was specifically raised before him by the EEOC; the decision of the Court was that this should not be done. Yet, the communications and questionnaires were submitted to the class members shortly thereafter by the TWA hostess, who testified that she received the list of names and addresses of class members from the EEOC, and by the American stewardess, who testified that she had been in communication with the EEOC. Judge Perry stated that he would not chastize (sic) the stewardess and hostess involved because they obviously were ignorant of the court rule; however, he severly (sic) condemned the EEOC for its participation in the unfortunate situation and the confusion thereby created.

The settlement agreements will become effective unless a party prior to April 17, 1972, appeals from Judge Perry's order, in which case the settlement agreements once again will be held up pending the appeal. Should the agreements become effective, additional information will be furnished to the members of the pregnancy class advising them of how, when and where to apply for reinstatement. It is hoped by ALSSA that no appeal will be forthcoming which will further delay the reinstatement of those members of the pregnancy class who desire to return to work. Of particular concern is the effect of another delay on the vacancies which will be available for returning members. At ALSSA's insistance (sic) the two carriers submitted evidence to Judge Perry showing that they will have open sufficient vacancies to accommodate the entire class within a short period should the settlement agreements be approved by the Court. However, should the effective date of the agreements be further delayed, there is no guarantee that those vacancies will still exist.

ALSSA requested and received prior permission from Judge Perry to communicate about this case before making this publication.

This Report Has Been Prepared By ALSSA Chief Attorney, Gilbert Feldman.

March 20, 1972

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO et al., Plaintiffs,

v.

AMERICAN AIRLINES, INC., Defendant.

Appeal of Darlene PRESTON et al., in No. 72-1336.

Appeal of Bonnie PULSKAMP et al., in No. 72-1503.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO et al., Plaintiffs,

v.

TRANSWORLD AIRLINES, INC., Defendant.

Appeal of Patricia A. SANTINI et al., Darlene PRESTON et al., Plaintiffs-Appellants,

v.

AMERICAN AIRLINES, INC., et al., Defendants-Appellees.

Nos. 72-1336, 72-1503, 72-1335, 72-1399.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 11, 1973.

Decided Dec. 21, 1973.

Before KILEY, FAIRCHILD and STEVENS, Circuit Judges.

FAIRCHILD, Circuit Judge.

These appeals form a sequel to Air Lines Stewards, etc., Loc. 550 v. American Airlines, Inc., 455 F.2d 101 (7th Cir., 1972), and some of the background facts appear there. That decision, affirming denial of intervention by EEOC, was filed January 18, 1972. Thereafter notices of hearing in the district court on approval of the settlement, referred to at 455 F.2d 103, were mailed to members of the class in each action. A hearing was held. Plaintiff union (ALSSA) and the defendants supported the settlement, and the support of several individual members of the class was made known. Objections on behalf of dissatisfied members of the classes, including several named individual plaintiffs, were filed or made known at the hearing.

On March 17, 1972, a judgment was entered in each action (American Airlines, Inc., and Trans World Airlines, Inc., being the respective defendants), approving the settlement, ordering it implemented, and dismissing the action on the merits. Appeals were filed by members of the classes, including certain named plaintiffs, in each case. A related action against American and ALSSA was also dismissed, and those plaintiffs appealed.

Appellants contend that the district court should not have approved the settlements because ALSSA (certified bargaining agent for airlines cabin attendants under the Railway Labor Act), which negotiated the settlements disposing of the interests of members of the class, had interests antagonistic to them. Appellants also maintain that they were entitled to exclude themselves from the action and avoid the binding effects of the judgments. Other arguments are urged in addition.

Until October, 1970, defendant airlines followed the practice of discharging, permanently, a stewardess who became pregnant. On August 18, 1970, ALSSA and 12 stewardesses who

had lost their jobs under this policy commenced an action against American challenging this practice as unlawful sex discrimination, in violation of 42 U.S.C. § 2000e et seq. The complaint asserted that the action was within Rule 23(b)(2), F.R.Civ.P., and that the class consisted of all present and former American stewardesses employed at any time since July 2, 1965, the effective date of the Civil Rights Act of 1964, who had been, desired to be, or would in the future desire to be, pregnant. The complaint sought declaratory, injunctive, and monetary relief. On the same day, ALSSA and five individuals filed a similar action against TWA.

Counsel for ALSSA signed the complaint as attorney for the plaintiffs and conducted the litigation and negotiations for settlement. He did not consult the individual plaintiffs nor any other members of the class concerning the terms of settlement.

By October, 1970, ALSSA and the airlines had made collective bargaining agreements which eliminated the challenged practice prospectively. Thus, although the class defined by the complaints included currently employed stewardesses who, presumably, had an interest in the declaratory and injunctive relief sought, that segment of the class had little further interest in the action, except for such interest as the junior among them would have adverse to the reinstatement of previously discharged stewardesses. Since the currently employed stewardesses were more actively the constituents of ALSSA, the change of circumstances made ALSSA at least a less adequate representative of the remaining members of the class than it may have been considered for the entire original class.

In July, 1971, counsel agreed on a settlement, subject to court approval. The proposed terms required discharged stewardesses who desired re-employment to notify the airline within 60 days from court approval. They would then be placed on a preferential hiring list, to be employed to fill vacancies before others were hired. When offered a job, a stewardess must

accept within 10 days and meet specified standards of physical condition. The airline would have no liability whatsoever to any stewardess who failed, timely, to give the notice of desire to be re-employed or notice of acceptance of an offer. If reemployed, the stewardess would start with the same seniority as she had up to the date of termination, in the case of TWA, or that seniority plus 90 days additional in the case of American. Under the agreement, an order would be entered defining the class, in each case, as all former stewardesses who were removed from the payroll because of pregnancy, between July 2, 1965 and July 31, 1969, in the case of TWA, and August 11, 1970, in the case of American. If approved the settlement and resulting judgment, would bind all members of the class.

It does not appear that the district court made any order concerning the maintenance of these actions as class actions, pursuant to Rule 23(c)(1), until July 16, 1971, after the settlement had been proposed. On that date, the court ordered that the class in each action be redefined in accordance with the settlement agreement, and that the action be maintained as a class action. The order did not expressly address the fulfilment of the prerequisites listed in Rule 23(a) nor of any additional requirement of Rule 23(b). Presumably the court did not consider (b)(3) applicable, as it did not order a notice pursuant to (c)(2).[1]

[1] Rule 23(b)(3) provides:

"An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution of defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the

Notices of hearing on approval of the settlement were sent out, both in July, after which the hearing was delayed by the appeal, and again the next February.[2]

At or before the March, 1972 hearing on approval of the settlement, opposition to it was manifested by some of the named plaintiffs and by other members of the class in each action. With some variations, the objectors wanted all, or more nearly all, of the "whole loaf", i.e., reinstatement with seniority accrued to date, and back pay. Several members of the American class, the appellants here in No. 72-1503, had brought their own action July 14, 1971 in the Central District of California. They had attempted to opt out of the instant action, their California action, meanwhile, having been stayed. The district court heard objecting plaintiffs and class members, and their attorneys, only in the capacity of objectors, and in effect recognized ALSSA as the sole representative plaintiff, representing all class members, including the individual named plaintiffs.

The judgments entered as a result of the hearings determined that "Plaintiffs", without distinguishing between ALSSA and

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particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Rule 23(c)(2) provides:

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

[2] Rule 23(e) requires notice to class members of a proposed settlement. The appellants contest the adequacy and accuracy of the notice procedures used here. In light of our disposition of the balance of the case, we do not reach this issue.

other plaintiffs, are adequate representatives of the class and have adequately represented them; that the action is a Rule 23(b)(2) class action;[3] that the judgment is binding on all members of the class; and that the settlement is fair, reasonable, and adequate for all.

On February 28, 1972, Darlene Preston, a plaintiff in the action against American, above referred to, had brought a new class action against American and ALSSA predicated upon a claim of unlawful discrimination similar to that in the earlier complaint, and upon a claim that ALSSA failed to fulfill its duty of fair representation. Judgment was entered March 20, 1972 dismissing the complaint, apparently on the ground that the claims had been adjudicated by the judgment of March 17, 1972.

1. *ALSSA's Representation of the Class.*

Mr. Feldman, counsel for ALSSA, and attorney of record for all the plaintiffs, testified in support of the settlement.

He took into consideration the proposition that the answer to the ultimate question of liability, common to all members of the class, i. e., whether the discharge policy was a violation of the Act, was less than a certainty. He felt that about 90% of the members of the class faced a serious legal question as to recovery because they had been terminated long before any complaint was filed with EEOC and these stewardesses might not be able to rely on the later filing by other members of the class. He noted that the circumstances of termination varied and that these differences might raise questions concerning

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[3] Rule 23(b)(2) provides:

"An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or . . . ."

recovery by members of the class. The airlines had terminated some on the ground of pregnancy, and others on the ground that they had concealed pregnancy, in violation of a company rule. Others had voluntarily resigned after becoming pregnant, and others resigned, but claimed they were coerced.

Mr. Feldman testified that ALSSA made the decision to agree to the settlement. One advantage was that it afforded an opportunity to every member of the class to return to work, including those against whom the statute of limitations defense might have been urged, as well as those whose claim did not have that problem; those whose termination had clearly been grounded on pregnancy, as well as those who had less clearly been terminated for that cause.

Mr. Feldman conceded that ALSSA had obligations to groups which had conflicting interests. Junior currently employed stewardesses would be harmed by immediate reinstatement of former stewardesses, and the settlement did not provide such reinstatement. Seniority has a very important effect on stewardesses' trip assignments and the like. Thus the former stewardesses who were reemployed pursuant to the settlement would want seniority to accrue during the period they had been out of the job, but the greater the seniority awarded to them, the larger the number of currently employed stewardesses who would be put to disadvantage. Mr. Feldman testified that the extent of seniority agreed on represented a compromise of the interests of the various groups.

The airlines said they were unwilling to negotiate concerning back pay. Mr. Feldman conceded that if the matter were litigated and liability established, there would probably be individual members of the class who could establish back pay claims. He estimated that full litigation would consume about five years. ALSSA decided to subordinate the interest of those who wanted to recover money to the interest of those who desired to return to work. This, he said, was an example of bargaining agent responsibility, to resolve in good faith the

conflict in interest between groups, both of which are represented by the union.

Rule 23(a)(3) requires that the claims of a representative plaintiff be typical of the claims of the class and (4) requires that the representative plaintiff will fairly and adequately protect the interests of the class. It has been indicated "that the reasons for requiring an individual plaintiff in a class action to be a member of the class do not necessarily preclude an association from representing a class where its *raison d'etre* is to represent the interest of that class."[4] It seems clear, however, that unless ALSSA's status as certified bargaining agent under the Railway Labor Act alters the situation, it cannot, under the circumstances, be treated as the equivalent of a group of former stewardesses terminated on account of pregnancy, and thus members of and adequate representatives of, the class.

ALSSA admittedly considered and to some extent protected the interests of the currently employed stewardesses in working out the settlement. They, who are presently presumably in control of ALSSA, are not members of the class as now defined, and they have antagonistic interests. In Hansberry v. Lee, 311 U. S. 32, 45, 61 S. Ct. 115, 85 L. Ed. 22 (1940), the Supreme Court held that a judgment in a class action can only bind absent class members where the representative's interests coincide with those of the balance of the class.

Counsel for ALSSA apparently would concede that if ALSSA were deemed merely an association of presently employed stewardesses, or even of both presently and formerly employed stewardesses, it would not be deemed an adequate representative of the class. Counsel argues, however, that ALSSA's role as an exclusive collective bargaining agent for the stewardesses employed by these airlines gives it the power to accommodate and adjust the rights of present and former stewardesses which

[4] Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 (2d Cir., 1965).

spring from Title VII, subject only to its obligation of fair representation. If this position were adopted, it need only be shown that ALSSA acted in good faith and in a manner which could be deemed fair, in making the choices involved in the settlement. Approval of the settlement could then be set aside only if the findings of good faith and fairness were found clearly erroneous.

In Steele v. Louisville & Nashville R. R. Co., 323 U. S. 200, 65 S.Ct. 226, 231, 89 L.Ed. 173 (1944), the Supreme Court held that the Railway Labor Act, in requiring the carrier to bargain with the chosen representative, operated to exclude any other representative, and deprived minority members of the craft of the right to choose a different representative or to bargain individually as to matters which are properly the subject of collective bargaining. It follows that the representative may make contracts having unfavorable effects on some of those represented, but the representative has "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." A similar holding was reached under the National Labor Relations Act in Ford Motor Co. v. Huffman, 345 U.S. 330, 336, 73 S.Ct. 681, 97 L.Ed. 1048 (1953).

In Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1963), the Supreme Court dealt with challenges to the resolution of grievances pursuant to a multi-party collective bargaining agreement. At p. 349, 84 S.Ct. at p. 371, the Court said, concerning the antagonistic interests of two groups, that "both groups [were] represented by the same union, whose president supported one group and opposed the other at the hearing before the Joint Conference Committee. But we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another."

In Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), a union member who had been discharged sued the union for its refusal to take the grievance to arbitration under the collective bargaining agreement. The Supreme Court found no evidence of personal hostility or bad faith on the part of the union officers, and set aside a verdict in favor of the plaintiff. "Having concluded that the individual employee has no absolute right to have his grievance arbitrated under the collective bargaining agreement at issue, and that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious, we must conclude that that duty was not breached here." p. 194, 87 S.Ct. p. 919.

Counsel suggests that accommodation of the Railway Labor Act with Title VII of the Civil Rights Act of 1964 requires that the collective bargaining representative be accorded the same power and held to the same degree of duty as the cases just cited accord it in the formulation and administration of collective bargaining agreements and the rights of individual employees thereunder. We are unable to agree.

Title VII, unlike the National Labor Relations Act and Railway Labor Act, does not create nor necessarily recognize powers of exclusive representation, either for those currently employed in the unit nor for a group which would include those claiming to have been unlawfully discharged. The situation is not parallel, and it does not seem to us that policy reasons militate in favor of similar status for the bargaining representative. An individual who claims to have been the victim of unlawful discrimination has the right to redress individually, whether the discrimination was an isolated act or a general practice.

> "The real party in interest in conciliation endeavors is the employee alleged to have been discriminatorily treated. He is completely free to accept or reject the proposals of union or employer as well as the position taken by the [Equal

Employment Opportunities] Commission." Air Lines Stewards, etc. Loc. 550 v. American Airlines, Inc., 455 F.2d 101, 106 (7th Cir., 1972).

Surely the fact that a labor organization is defined in 42 U.S.C. § 2000e and made a potential defendant in unlawful employment practice cases does not, as counsel seems to suggest, indicate an intention on the part of Congress that a collective bargaining representative play a special role in Title VII actions to redress unlawful employment practices by an employer.

We think a union may serve its members by being plaintiff in a suit to vindicate their civil rights. "There is nothing in the law which precluded the Union from recognizing the injustice done to a substantial minority of its members and from moving to correct it." Bowe v. Colgate-Palmolive Company, 416 F.2d 711, 719 (7th Cir., 1969). When it espouses the interest of one group of its Members, it doubtless has an obligation of fairness to any members whose interests are in conflict. But except for the area of collective bargaining and its necessary incidents, the union has no unique authority to compromise the rights of its members. Its adequacy as a representative party in a class suit, and its authority to compromise the rights of its members in a class suit when such rights do not arise out of collective bargaining agreements are to be tested and judged in the ordinary way.[5]

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[5] See Cook County College Teachers U., Loc. 1600, A.F.T. v. Byrd, 456 F.2d 882, 885 (7th Cir., 1972); Mungin v. Florida East Coast Ry. Co., 318 F.Supp. 720 (M.D.Fla., 1970), aff'd 441 F.2d 728 (5th Cir., 1971), cert. denied sub nom. Howard v. Florida East Coast Ry. Co., 404 U.S. 897, 92 S.Ct. 203, 30 L.Ed. 2d 175; Amalgamated Meat Cutters of No. Am. V. Safeway Stores, Inc., 52 F.R.D. 373, 375 (D.Kan., 1971). *Amalgamated Meat Cutters* is similar to the present case. There, certain of the defendant's female employees and their union filed a class action alleging that the defendant had failed to pay men and women the same wage for the same work, a violation of 42

2. *The Right of Class Members to Exclude Themselves From the Actions Originally Brought.*

Appellants argue that the district court must offer the members of the class the opportunity to "opt out", or exclude themselves from the class. Rule 23(c)(2) requires that such opportunity and an alternative opportunity to enter an appearance through counsel, must be afforded in any class action maintained under Rule 23(b)(3). Unless a class action is maintained under Rule 23(b)(3), no right to opt out exists. All members of the class are bound by the judgment.

On July 16, 1971, when the first orders dealing with the actions as class actions were entered, the court did not expressly address the question whether or not they fell under Rule 23(b)(3). In the judgments, the court held they fell under Rule 23(b)(2), thus foreclosing the opportunity of any member of the class to exclude herself.

Rule 23(b)(2) applies to class actions in which

> "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."

When these actions were filed, the class included both stewardesses who had been terminated for pregnancy and those

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U.S.C. § 2000e-5(e). The union and the employer negotiated a compromise and sought the court's approval under Rule 23(e). Certain of the class members, including one of the individual named plaintiffs, objected to the compromise as unfair. The district court refused to approve the settlement and ordered independent counsel appointed for the dissenting class members. The court observed that:

> "However, counsel for the plaintiffs has appeared in a dual capacity—that is, both the Union's attorney and attorney for the Class members. It is apparent from the communications in the file, as well as the expressions in open court, that the interests of the Union as a plaintiff, and the interests of at least a portion of the members of the Class are in conflict and not identical." 52 F.R.D. at 375.

who might in the future be terminated for that cause. The latter were primarily, perhaps solely, interested in a declaration that the practice of termination for that reason is unlawful and an injunction against it. As to that group, (b)(2) would clearly be applicable.

Subdivision (b)(3) applies where:

"the court finds that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy."

All the stewardesses share the common question of whether the discharge-for-pregnancy policy was lawful. Those who had already been discharged were interested in reinstatement with or without back pay, and assuming a favorable decision on the common question, the entitlement of any particular former stewardess to reinstatement, back pay, and accrued seniority would depend on the facts peculiar to her. The amount of back pay would be computed separately for each, and reduced by her interim earnings.[6] Mr. Feldman's testimony shows other differences among individual cases. Some who had not filed with EEOC might have difficulty in establishing the right to rely on the filings of others. The manner and stated cause of termination of employment varied.

As to the discharged stewardesses, the class actions would, even at the beginning, have had to be maintained under (b)(3), with each such stewardess having the right to exclude herself, or appear through counsel.

When the airlines ended their discharge policy, the actions became virtually moot as far as the currently employed stewardesses were concerned, and purely prospective relief against the practice became of little moment. The (b)(3) character of

[6] 42 U.S.C. § 2000e-5(g).

the actions, while always present as to the discharged stewardesses, became even more obvious.

In *Gerstle* v. *Continental Airlines, Inc.*, 50 F.R.D. 213 (D.Colo., 1970), a former stewardess brought a class action, seeking injunctive relief, back pay, and reinstatement for stewardesses terminated because of marriage. The airline had dropped the policy after terminating plaintiff. The court held that in view of the change in policy after terminating plaintiff. The court held that in view of the change in policy there was no case for injunctive relief, but that the action should proceed under (b)(3) as to the other types of relief. The present actions are similar.

We have no doubt that even in a class action subject to (b)(3), situations could arise where individual members of a class so clearly acquiesced in and accepted the efforts of their union or other plaintiff for so long a period and under such circumstances that they would be estopped from exercising their right to exclude themselves and "spoiling" a settlement obtained by such efforts. Nothing revealed in this record puts these cases in that posture.

The actions originally brought against the two airlines should have been, and should henceforth be treated as (b)(3) class actions with the attendant right of a class member, for a reasonable interval, to exclude herself or appear through counsel pursuant to Rule 23(c)(2).

3. *Remand of the Actions Originally Brought Against the Two Airlines.*

On remand, the district court should:

(1) Permit one or more of the named plaintiffs or other members of the class in each action to replace ALSSA as the representative of the class. If it should appear desirable for adequate representation of all class members, subclasses, each with its own representative, may be created.

(2) Require that notices, pursuant to Rule 23(c)(2) be sent, offering to each member of the class the opportunity to exclude herself from the class or appear through counsel.

(3) Proceed with the litigation unless settlement as to some or all issues is agreed on by the appropriate parties, and approved, on notice, by the court.

4. *The Preston Action Brought in February, 1972.*

We express no conclusions with respect to this action except that, since it was dismissed on the theory that the claims therein have been adjudicated by a judgment now being reversed, the judgment dismissing it should also be reversed.

The judgments appealed from are reversed and the causes remanded for further proceedings consistent with this opinion. Circuit Rule 23 shall apply on remand.

Rec. No. 1

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Anne B. Zipes, Frances M. Swift, *et al.*,
Plaintiffs,

vs.

Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO and Trans World Airlines, Inc.,
Defendants.

Civil Action
No. 74 C 2063.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND DAMAGES

(Filed July 22, 1974)

Now Come Plaintiffs, Anne B. Zipes and Frances M. Swift, by their attorneys, and complain of the Defendants as follows:

1. This is a class action, authorized and instituted pursuant to Rule 23 Fed. Rules Civ. Proc., 28 U. S. C. and Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), 42 U. S. C. § 2000e *et seq.*, particularly 42 U.S.C. § 2000e-3(a). Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §§ 1343(4), 2201, 2202 and 42 U. S. C. § 2000e-5.

2. Declaratory and injunctive relief, damages including punitive damages, and other appropriate relief, including attorneys' fees and costs, as authorized by 42 U. S. C. § 2000e-5(g) and (k), are requested herein.

3. This action seeks relief from certain discriminatory acts perpetrated by the Defendants against Plaintiffs and the class they represent herein. Said discriminatory acts were and are

punitive in nature, and Defendants committed said acts in retaliation for participation of Plaintiffs and the class in a Title VII class action against Defendant Trans World Airlines, Inc. (hereinafter "TWA") filed in this Court on August 18, 1970, entitled *Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO* v. *Trans World Airlines, Inc.*, Civil Action No. 70 C 2071 (hereinafter "the original class action"), still pending in this Court, and were and are specifically in violation of Title VII, 42 U. S. C. § 2000e-3(a), which provides in part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . or for a labor organization to discriminate against any member thereof . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The discriminatory retaliatory acts were and are unlawful regardless of the merit of the underlying charges and proceedings in connection with which those acts occurred.

4. The individual named Plaintiffs herein and members of the class they represent were employed by TWA as flight attendants, flight hostesses, (hereinafter "stewardesses") at some time on or after July 2, 1965 (the effective date of Title VII). Each named Plaintiff and class member was a member of Defendant Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO (hereinafter "the Union") at some time or times during the period beginning July 2, 1965. Each named Plaintiff and class member was deprived of her stewardess employment on or subsequent to July 2, 1965 by reason of TWA's policy of discharging stewardesses who had become pregnant and refusing to afford stewardess employment to women with children, a policy in which the Union acquiesced. Each named Plaintiff and class member was and is a member of the plaintiff class in the original class action, which was brought

to challenge said policy and to seek affirmative relief from its continuing discriminatory effects on plaintiffs and the class.

5. The Union was and is a labor union and representative of employees as defined in the Railway Labor Act, 45 U. S. C. § 151, and a labor organization as defined in Title VII, 42 U. S. C. § 2000e(d). The Union was a named plaintiff, along with several discharged stewardesses, in the original class action. The Union's main business office was and is located in the City of Chicago and State of Illinois. The unlawful employment practices committed, and being committed, by the Union, as alleged herein, have occurred and are occurring in the City of Chicago and State of Illinois. In the event the Union has been transmuted into a successor union or unions, this Complaint is alleged to include said successor or successors.

6. TWA is a carrier by air and an employer as defined in the Railway Labor Act, 45 U. S. C. §§ 151, 181 and is an employer engaged in an industry affecting commerce, employing twenty-five or more persons, as defined in Title VII, 42 U. S. C. § 2000e(b). TWA does business in the City of Chicago and State of Illinois. The unlawful employment practices committed, and being committed, by TWA, as alleged herein, have occurred and are occurring in the City of Chicago and State of Illinois.

7. This class action is brought pursuant to Rule 23 Fed. Rules Civ. Proc., 28 U. S. C. on Plaintiffs' own behalf and on behalf of a class consisting of all persons who were and are members of the plaintiff class, as defined by the judgment order of this Court entered March 17, 1972, in the original class action. The class, consisting of more than three hundred (300) persons, is so numerous that joinder of all members is impracticable. There are common questions of law and fact, and the claims of Plaintiffs are typical of those of the class. In committing the unlawful employment practices alleged herein, Defendants have acted and refused to act on grounds applicable to the class, thereby making appropriate final injunctive,

declaratory and remedial relief with respect to the class as a whole. Plaintiffs, as representative parties, by their counsel, will fairly and adequately represent and protect the interests of the class.

8. Defendants have engaged in, and continue to engage in, unlawful employment practices with respect to the class in violation of Title VII, 42 U. S. C. § 2000e-3(a), as follows:

(a) During the pendency of the original class action Defendants entered into an agreement of compromise and settlement with each other, in an attempt to forcibly dispose of the claims of the class for certain relief such as reinstatement, back pay and full accrued seniority. In return each class member was to be given the right to apply to be placed merely on a preferential hiring list from which she might be selected and employed, as stewardess job openings became available, with whatever seniority she may have had at the time of termination of her employment. Certain other preconditions were included. (A copy of that settlement is attached hereto as Exhibit A, and made part hereof.)

(b) After hearings this Court approved the settlement terms by its judgment order of March 17, 1972. (That order, among others, was reversed on December 21, 1973 by the United States Court of Appeals for the Seventh Circuit. 490 F. 2d 636. Among other reasons for reversal, the Court held that the Union and its counsel had not afforded adequate representation to the other individual named plaintiffs and class members.)

(c) After that approval of the settlement, a Notice of Appeal was timely filed on April 11, 1972 by Plaintiff Zipes and two additional appellants who were plaintiffs in the original class action. On or about April 20, 1972, after the Notice of Appeal was filed, the Defendants entered into an agreement with each other to coerce all class members, including plaintiffs other than the Union, to give up their

rights to benefits under the then-pending appeal as a condition of possible reemployment under a so-called "Amendment" to the settlement. (A copy of that "Amendment" is attached hereto as Exhibit B and made part hereof.) Under that "Amendment" class members were offered the opportunity to receive the minimal benefits of the settlement (then pending before the Seventh Circuit on appeal) on the condition that they execute a written waiver of rights, including those which might accrue to them as members of the class should the appeal be successful and subsequent proceedings result in an award of additional and greater relief than that offered in the settlement. Said "Amendment" was conceived, executed and sent to the class members without the knowledge or approval of this Court, but carried the caption of the original class action in a bald attempt to make it appear that the "Amendment" had the sanction of this Court.

(d) Those class members who succumbed to the coercion by the Defendants and accepted the benefits offered in the "Amendment" were placed on a preferential hiring list, while those class members who did not waive their rights were denied the opportunity to then seek reemployment as stewardesses under the settlement terms. Those who accepted the benefits offered in the "Amendment" and did return to work returned with minimal benefits, not including those additional benefits sought in the original class action. Because of their limited seniority status upon returning to work, those class members who did submit to the coercion were more vulnerable to layoffs (e.g., those which occurred during the recent energy crisis) and subject to many relative disadvantages attendant upon the lack of a more senior stewardess status. By requiring of those class members the execution of a waiver of rights, Defendants discriminated against them by depriving them of their federally-protected right to participate without retribution in proceedings seeking

full affirmative relief from the discriminatory employment practices complained of in the original class acion. On the other hand, those who did not accept the discriminatory offer were deprived of any opportunity to then seek reemployment as stewardesses, even with the minimal benefits given to those who did waive their rights and seek reemployment.

(e) In connection with the offer of the "Amendment" Defendants, or one of them, corresponded with class members, making representations designed to further assist Defendants in their efforts to discriminate against the class, as alleged herein. (A copy of an illustrative example of such correspondence is attached hereto as Exhibit C, and made a part hereof.)

In their offers of settlement benefits under the "Amendment" and in their activities to date designed to coerce class members into accepting those offers, Defendants have engaged, and continue to engage, in intentional practices designed to reduce the membership of the class in the original class action, deprive class members of those benefits to which they are entitled by law by reason of the prior unlawful terminations of their employment, and discourage and prevent class members from fully asserting their Title VII rights. This conduct by Defendants, aimed exclusively at persons who were and are members of a litigant plaintiff class in a Title VII class action, constitutes differing and discriminatory treatment in violation of Title VII, 42 U. S. C. § 2000e-3(a).

9. The actions of the Defendants, as hereinabove alleged, constituted a conspiracy between them, maliciously carried on, to deprive the members of the class of their civil rights in violation of Title VII.

10. On or about May 16, 1972, within one hundred, eighty (180) days from the date of the initial unlawful employment practices alleged herein, each of the named Plaintiffs filed a Charge of Discrimination with the Equal Employment

Opportunity Commission (hereinafter "the EEOC") in accordance with Title VII, 42 U. S. C. § 2000e-5(e), alleging the unlawful employment practices as described hereinabove and naming TWA and the Union as charged parties. Within ninety (90) days prior to the filing of this Complaint, each of the Plaintiffs herein received from the EEOC notices of their right to sue the Union and TWA in a United States District Court on the basis of said Charges of Discrimination, in compliance with and pursuant to Title VII, 42 U. S. C. § 2000e-5(f).

Wherefore, Plaintiffs respectfully pray that this Court, upon hearing, enter the following orders in accordance with the provisions of Title VII, 42 U. S. C. § 2000e-5(g) and (k):

(a) Declaring the rights of the parties and finding that the aforementioned conduct of Defendants was and is violative of Title VII, 42 U. S. C. § 2000e-3(a);

(b) Entering preliminary and permanent injunctions enjoining and prohibiting Defendants from engaging in any conduct with respect to Plaintiffs and the class which is violative of Title VII;

(c) Ordering Defendants by mandatory injunction to take such action as is deemed necessary to eliminate the effects of said unlawful conduct and to assure that such unlawful conduct does not continue to affect the employment rights and opportunities of Plaintiffs and the class, including but not limited to

(i) Ordering Defendants to offer all class members immediate placement on the preferential hiring list, as set out in the settlement agreement, regardless of whether or not they have signed, or agree to sign, any waiver of their rights including the rights to seek further relief in the original class action, and

(ii) Ordering Defendants to declare null and void all waivers heretofore executed by class members, and to

refrain from requesting or accepting any further waivers of rights from any class members;

(d) Ordering Defendants to provide monetary relief including back pay to any of the Plaintiffs or class members for losses sustained as a result of Defendants' violation of Title VII, 42 U. S. C. § 2000e-3(a);

(e) Ordering Defendants to grant other affirmative relief to Plaintiffs and the class, such as accrual of seniority and those job perquisites which any of the Plaintiffs or class members may have been denied by reason of Defendants' unlawful conduct in violation of Title VII, 42 U. S. C. § 2000e-3(a);

(g) Declaring that the relief granted herein is solely to make Plaintiffs and the class whole and protect them from further damages and disadvantages arising out of Defendants' violation of the reprisal provisions of Title VII, 42 U. S. C. § 2000e-3(a), and declaring that the award of such relief as is deemed necessary and proper in this action shall in no way prejudice Plaintiffs and the class from seeking additional and supplementary relief in the original class action or other actions filed or to be filed against Defendants, or either of them, for unlawful conduct with respect to Plaintiffs and the class other than that alleged as the basis for relief in this action;

(h) Ordering Defendants to pay Plaintiffs and the class punitive damages; and

(i) Ordering such other and additional relief as this Court deems necessary or proper.

Arnold I. Shure
Ten South LaSalle Street,
Room 1100
Chicago, Illinois 60603
(312) 346-4537
Charles Pressman
33 North Dearborn Street,
Room 707
Chicago, Illinois 60602
(312) 372-6475
By Arnold I. Shure, one of the attorneys for Plaintiffs Anne B. Zipes and Frances M. Swift

Dated: July 22, 1974

Rec. No. 5

* * (Caption—No. 74 C 2063) * *

MOTION TO DISMISS

(Filed September 19, 1974)

Defendant, Trans World Airlines, Inc., by its attorneys, Gardner, Carton, Douglas, Chilgren & Waud, moves the Court to dismiss this action for the following reasons:

1. The complaint fails to state a claim upon which relief can be granted:

2. The issue in this case has previously been determined adversely to the plaintiffs in a prior action and the plaintiffs are barred by the principles of *res adjudicata* and collateral estoppel from relitigating the issue;

3. The issue is involved in a prior pending action between the same parties; and

4. Plaintiffs do not have standing to raise the issue involved in the complaint.

Wherefore, defendant Trans World Airlines, Inc. moves the Court to dismiss this action on all or any of the above enumerated grounds.

Trans World Airlines, Inc.
By /s/ Laurence A. Carton
One of Its Attorneys

Rec. No. 13

* * (Caption—No. 70 C 2071) * *

MOTION TO AMEND ANSWER

(Filed September 16, 1974)

Defendant, Trans World Airlines, Inc., by its attorneys, Laurence A. Carton and Joseph P. Carr, moves the Court, pursuant to Rule 15(a), for the entry of an order to permit defendant to amend its answer to the complaint instanter by adding the following third affirmative defense:

Third Affirmative Defense

14. Plaintiffs and members of the class failed to file charges with the Equal Employment Opportunity Commission within 180 days after the alleged unlawful employment practices occurred with the result that their claims are barred by the statute of limitations under Section 706(e) of Title VII.

Respectfully submitted,

/s/ Laurence A. Carton
/s/ Joseph P. Carr
Attorneys for Defendant Trans World Airlines, Inc.

Rec. No. 13

* * (Caption—No. 70 C 2071) * *

MEMORANDUM OPINION AND ORDER

(Entered September 16, 1974)

This matter arises on the motions of plaintiffs Patricia A. Santini and Pamela J. Dailing and respondent-appellant in the prior appeal of these actions, Anne B. Zipes, (the movants) to be appointed as representative class plaintiffs and to appoint Arnold I. Shure and Charles Pressman as counsel to represent the plaintiff class in this case. This case is before the Court on remand from the United States Court of Appeals for the Seventh Circuit in *Air Line Stewards and Stewardesses Association, Local 550, et al,* v. *American Airlines, Inc., et al.,* 490 F. 2d 636 (7th Cir. 1973), *cert. denied,* ____ U. S. ____, 94 S. Ct. 2406 (1974).

In reversing a previously entered judgment order approving settlement of this class action, the Seventh Circuit held:

> "The actions brought against the two airlines [American Airlines and Trans World Airlines] should have been, and should henceforth be treated as (b)(3) class actions with the attendant right of a class member, for a reasonable interval, to exclude herself or appear through counsel pursuant to Rule 23(c)(2)." 490 F. 2d at 643.

Thus, the Court of Appeals unequivocally directed this Court to proceed with these actions as (b)(3) class actions. The court further stated that:

> "[o]n remand the district court should: (1) Permit one or more of the named plaintiffs or other members of the class in each action to replace ALSSA [Air Line Stewards and Stewardesses Association Local 550, TWU, AFL-CIO] as the representative of the class. If it should appear desirable for adequate representation of all class members, subclasses, each with its own representative, may be created.
>
> "(2) Require that notices, pursuant to Rule 23(c)(2) be sent, offering to each member of the class the opportunity to exclude herself from the class or appear through counsel.

"(3) Proceed with the litigation unless settlement as to some or all issues is agreed on by the appropriate parties, and approved, on notice, by the court." 490 F. 2d at 643-44.

Pursuant to the mandate of the Court of Appeals and the requirements of Rule 23(a)(3) and (4), this Court will consider in determining whether to appoint the movants class representative whether the claims of the movants are typical of those claims of the class as a whole and whether the movants will fairly and adequately represent the interests of the class. The past conduct of this litigation demonstrates that the movants fulfill both requirements. Each of the movants alleges that she was a TWA stewardess who left her employment with the airline by reason of her pregnancy after July 2, 1965, the effective date of the Civil Rights Act of 1964. Additionally, each movant is seeking the same type of relief as the class, including reinstatement, back pay, and accrued seniority. As to the adequacy of representation criterion contained in Rule 23(a)(4), throughout the course of this litigation movants have proven that they will vigorously and adequately protect the rights of members of the class. Movants' counsel have also demonstrated their qualifications to competently prosecute the further course of this litigation.

The defendant airline has asserted that this litigation is not appropriately brought as a class action because the requirements of Rule 23(b)(3) are not fulfilled; the airline maintains that common questions of law and fact do not predominate over any questions affecting only individual members of the class. The view of the Court of Appeals is obviously to the contrary and the question whether this case is to be treated as a (b)(3) class action is a closed issue.

TWA has also asserted that the movants' claims might not be typical because (1) if one of the movants failed to file a complaint with the EEOC, she may be barred from being a class representative and (2) if a movant failed to protest her

termination, her action may be barred. The defendant airline also asserts that conflicts over seniority create conflicts of interest which preclude the movants from representing the class. Therefore, the defendants propose that this Court defer ruling on the movants' motions until after pretrial discovery reveals the nature of the class, the characteristics of adequate representatives, and whether there is a need for subclasses and separate counsel. The Court of Appeals, however, directed that this Court proceed in the first instance with a choice of class representatives. Thus, at this juncture, despite the possibility that discovery may reveal the need for subclasses or alternative class representatives, the movants, consistent with the mandate of the Court of Appeals, have fulfilled their initial burden of proving typicality and adequacy entitling them to be designated as class representatives. Of course, if during discovery there are developed facts which demonstrate the need for subclasses or the naming of other counsel (or even make a (b)(3) class action inappropriate), Rule (23)(c)(1) allows this Court to take appropriate action.

For these reasons, the motion to appoint Anne B. Zipes, Patricia A. Santini, and Pamela J. Dailing class representatives in 70 C 2071 is granted. The motion to appoint Arnold I. Shure and Charles Pressman class counsel in 70 C 2071 is also granted.

Additionally, plaintiffs' counsel shall prepare and submit to the Court within twenty (20) days of the date hereof proposed notices to be sent to members of the class pursuant to Rule 23(c)(2).

It Is so Ordered.

Entered:

/s/ R. W. McLaren
United States District Judge

Dated: September 16, 1974

Rec. No. 10

* * (Caption—No. 74 C 2063) * *

AMENDED MOTION TO DISMISS

(Filed October 2, 1974)

Defendant, Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO, by its attorneys, Gilbert Feldman and Barbara Hillman, moves the Court to dismiss this cause on the following grounds.

1. The complaint fails to state a claim upon which relief can be granted.

2. The claim alleged in Plaintiff's Complaint has been determined in cause No. 70 C 2071, a prior action between the same parties and Plaintiffs are therefore estopped from relitigating the claim under the doctrine of *res adjudicata;* and

3. The claim raised on Plaintiff's Complaint involves subject matter, being litigated in cause No. 70 C 2071, a prior pending action between the same parties.

Respectfully submitted,

Kleiman, Cornfield and Feldman
/s/ Gilbert Feldman
Gilbert Feldman

Rec. No. 17

* * (Caption—No. 70 C 2071) * *

MOTION

(Filed October 10, 1974)

Now comes Patricia A. Santini, Pamela J. Dailing and Anne B. Zipes by their attorneys and submit herewith a proposed Rule 23 (c)(2) *Notice to Class.*

Respectfully submitted,

/s/ Charles Pressman
Charles Pressman, One of the Attorneys for Plaintiffs

* * (Caption—No. 70 C 2071) * *

NOTICE TO CLASS

Patricia A. Santini, Pamela J. Dailing and Anne B. Zipes have been appointed class representatives in a legal action in the United States District Court for the Northern District of Illinois, Eastern Division against Trans World Airlines, Inc. ("TWA") alleging that TWA violated Title VII of the Civil Rights Act of 1964 by engaging in unlawful employment practices continuously from July 2nd, 1965 whereby continued employment as flight cabin attendants was prohibited because of pregnancy.

On the 16th day of September, 1974, the Court determined that Patricia A. Santini, Pamela J. Dailing and Anne B. Zipes were the proper representatives for a class of persons consisting of the following: All female persons employed as flight cabin attendants whose employment with TWA was terminated on or after July 2nd, 1965 for reason of pregnancy.

This notice is being sent to you in the belief that you may be a member of the class of plaintiffs whose rights may be affected

by this litigation. This notice is not to be understood as an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by either side in this litigation, but is sent for the sole purpose of informing you of the pendency of this litigation so that you may make appropriate decisions as to steps you may wish to take in relation to this lawsuit.

TWA has denied liability.

Therefore, Take Notice:

1. If you have been a flight cabin attendant employed by TWA whose employment was terminated on or after July 2nd, 1965 because you became pregnant:

(a) The court will exclude you from the class represented by Patricia A. Santini, Pamela J. Dailing and Anne B. Zipes if you request exclusion in writing addressed to the Clerk of the U. S. District Court, 219 South Dearborn Street, Chicago, Illinois, on or before the ____ day of ____, 19___.

(b) If you do not request exclusion from the class by the ____ day of _____, 19___, you will be included in such class and any judgment, whether favorable, or unfavorable, will be binding upon you.

2. If you do not request exclusion from the class but prefer in connection with your individual claim to be represented by your own counsel rather than Patricia A. Santini, Pamela J. Dailing and Anne B. Zipes acting through counsel appointed by the Court, you may enter an appearance through your counsel but not later than the ___ day of ____, 19___.

Dated this ___ day of ____, 19___.

_____

Clerk

Rec. No. 18

* * (Caption—No. 70 C 2071) * *

ORDER

(Entered October 10, 1974)

Form of notice is filed and agreed to as to form and is approved by the court.

/s/ McLaren

Rec. No. 28

* * (Caption—Nos. 70 C 2069, 70 C 2071) * *

ORDER

(Entered November 29, 1974)

On oral motion of representatives of the plaintiff classes in cases numbered, 70 C 2069 and 70 C 2071, It Is Hereby Ordered and Decreed for each of the actions listed in the caption hereto that:

I. CONSOLIDATION

Cases numbered 70 C 2069, 70 C 2071, 72 C 498 and 74 C 2762 having been consolidated for purposes of pretrial proceedings and discovery by order of court entered November 18, 1974, shall be consolidated with case number 74 C 2063 for the same purposes.

II. COUNSEL

A. Charles Pressman and Arnold I. Shure are hereby designated as lead counsel in these cases with the authority to receive and forward all notices to the court and all counsel, to notify the court of responses and actions regarding pretrial discovery and pretrial pleadings, and to call conferences of plaintiffs counsel to consider action.

B. Lead counsel shall have the primary responsibility to initiate and conduct discovery, to prepare, review and file notices and memoranda in these consolidated actions and to act as spokesman for plaintiffs at future pretrial conferences and other hearings. Lead counsel should when possible consult with other attorneys for plaintiffs in efforts to minimize duplication and to reasonably accommodate scheduling of matters before the court. Counsel for other plaintiffs may participate in discovery and, after notice to lead counsel, may file supplementary memorandum, conduct nonduplicative supplementary discovery and file supplemental memoranda to the extent that any different interests of the other plaintiffs require such supplementation.

C. All documents produced by defendants in connection with discovery shall be available for other attorneys for plaintiffs who shall have the right to examine and copy such documents.

D. Defendants' counsel may rely on agreements with lead counsel as to matters of scheduling and discovery which is not supplemental to lead counsel discovery. All such agreements shall be binding on all counsel for plaintiffs in class actions unless otherwise ordered by this court; provided however, that lead counsel shall take such reasonable steps as may be appropriate to endeavor to accommodate scheduling of all counsel.

III. REPORT

E. Lead counsel shall report to this Court on Monday, December 2nd, 1974 at 10:00 A.M., as to the status of these consolidated cases.

Enter:

/s/ R. W. McLaren

Judge

Dated: November 25, 1974.

Rec. No. 23

* * (Caption—Nos. 70 C 2069, 70 C 2071) * *

MEMORANDUM OPINION AND ORDER

(Entered November 20, 1974)

These actions are class action Title VII equal employment sex discrimination cases challenging the practice of Trans World Airlines and American Airlines of terminating the employment of pregnant stewardesses. The cases are now before the Court on defendants' motions to amend their answers to include the affirmative defense of the statute of limitations.[1] Plaintiffs oppose these motions, asserting that (1) defendants have been guilty of unreasonable delay in asserting this defense, and (2) justice does not require defendants' being granted leave to amend because it would be unduly prejudicial to plaintiffs.

The following facts are relevant to disposition of these motions:

The complaints were filed on August 18, 1970, and defendants' answers were submitted to the Court on September 30, 1970.[2] There were no further proceedings in Court until July 16, 1971, when a settlement agreement was filed. But in the interim the airlines and the union amended their labor agree-

[1] The statute of limitations for Title VII actions is contained in 42 U. S. C. § 2000e-5e. At the time these actions were filed, the statute provided that to sustain an action under Title VII a charge must have been filed with the Equal Employment Opportunity Commission within 90 days after the alleged unlawful employment practice occurred. The time limit was increased to 180 days by the amendment of March 24, 1972 (P. L. 92-261, § 4).

[2] Defendants' answers contained two other affirmative defenses: first, that defendants' conduct was based upon a continuing policy which was a "bona fide occupational qualification reasonably necessary to the normal operation' of defendant's business within the meaning of 42 U. S. C. § 2000-2(e)," and the second, that the policy is "pursuant to a 'system which measures earnings by quantity and qualify or production' within the meaning of 42 U. S. C. § 2000e-2(h)."

ments to eliminate pregnancy as a ground for termination, and negotiated the settlement agreement. The hearing on that agreement began on March 10, 1972; the intervening delays was caused by the effort of the EEOC to intervene, including its appeal to the Seventh Circuit. On April 11, 1972, several plaintiffs filed their notices of appeal from the order approving the settlement agreement. Their appellants' brief was not filed until February 5, 1973. The Seventh Circuit decision reversing the order approving settlement was issued on December 23, 1973,[3] the Supreme Court denied a writ of certiorari on May 13, 1974. The case was assigned to this Court on July 11, 1974. TWA and American then filed their motions to amend the answers on September 11, 1974, the date set by the Court for a status report.

F. R. Civ. P. 15(a) provides that leave to amend "shall be freely given when justice so requires." The Supreme Court in *Forman* v. *Davis,* 371 U. S. 178, 182 (1962) held that this mandate is to be heeded, stating:

> "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'"

In the instant actions, plaintiffs could be unduly prejudiced by amendment. The absence of the defense of limitations could

[3] In *Air Line Stew. & S. Ass'n, Local 550* v. *American Airlines,* 490 F. 2d 636 (7th Cir. 1973), the court of Appeals reversed the settlement order previously entered in these actions. The court held that the Union could not act as representative of the individual stewardesses terminated because of conflict of interest in the Union over such matters as seniority. Moreover, the court determined that these actions should proceed as R. F. Civ. P. 23(b)(3) class actions instead of F. R. Civ. P. 23(b)(2) class actions.

have been considered by the present plaintiffs when they rejected the union-airlines settlement agreement and appealed the orders approving settlement to the Seventh Circuit. At that time plaintiffs could reasonably believe that the pleadings were completed especially considering the class allegations contained in these actions. Notice of the proposed settlement to members of the classes invited "any interested person or attorney" to inspect "all pleadings and other documents in the action." None of the documents apparently contained any notice of the statute of limitations defense although the Union's attorney did mention the possibility of the defense during oral hearings on the settlement agreement.

Plaintiffs also argue that even if undue prejudice cannot be shown, defendants should not be allowed to amend because they have been guilty of undue delay in asserting the limitations defense. Defendants justify their delay in filing the defense on three grounds: (1) legal uncertainty about availability of the defense; (2) active participation in the aborted settlement negotiations and (3) no district court judge had jurisdiction over the actions while the various appeals were pending.

Defendants assert that when the complaints were filed in 1970, there had been few decisions construing the limitations problems inherent in Title VII class actions. It is important to note, however, that defendants do not claim that the limitations language of the statute was ambiguous, nor do defendants assert that there were no cases to rely on for guidance. In fact, defendants cite a 1969 case, *Burney* v. *North American Rockwell,* 302 F. Supp. 86 (C. D. Cal. 1969), to support their substantive point that the Title VII statute of limitations affects unnamed class plaintiffs as well as named or individual plaintiffs.

Moreover, defendants make no showing how these proceedings could have prevented them from making a motion to the Court to amend their answers, particularly when defendants

original answers contained two other affirmative defenses. Additionally, the existence of this defense, properly plead, should have been a factor in defendants' posture during this stage of the litigation. That defendants failed to fully investigate the legal status of plaintiffs' claims at that time only demonstrates that defendants may not have completely prepared during settlement negotiations, not that the negotiations themselves prevented defendants from presenting their legal arguments to the Court.

Defendants' third argument that the pending appeals prevented them from amending also seems inequitous. While it is true that for substantial periods since filing in 1970 no district court judge had jurisdiction over these cases, defendants do not satisfactorily explain why when the district court did have jurisdiction (from filing in 1970 to April 1972), they made no motion to amend.

Defendants' delay in pleading the defense of limitations may well ultimately constitute a waiver of the defense; at this juncture, however, the Court is not convinced to a legal certainty that pleading of the defense shall not be allowed. Under the liberal pleading rules contained in Rule 15, defendants should be entitled to prove through discovery techniques or otherwise that the plaintiffs suffered no prejudice or that the delay in amendment was excusable. Defendants' motion to amend their answers is granted.[4]

IT IS SO ORDERED.

Entered:

/s/ R. W. McLaren
United States District Judge

Dated: November 18, 1974.

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[4] Of course, this disposition of defendants' motions is not intended to express any ultimate views on the waiver or laches issues or the substantive applicability of the 180 day statute of limitations.

Rec. No. 77

* * (Caption—No. 70 C 2069, 70 C 2071) * *

MOTION FOR ORDER EXCLUDING CERTAIN PERSONS FROM CLASS FOR LACK OF SUBJECT-MATTER JURISDICTION

(Filed December 16, 1975)

Defendants, American Airlines, Inc. and Trans World Airlines, Inc. move the Court to enter an order excluding from the plaintiff class each person formerly employed by a defendant as a flight cabin attendant (a) whose employment was terminated before March 1, 1970 because of pregnancy and (b) who did not file timely charges complaining of the termination with the Equal Employment Opportunity Commission on or before May 31, 1970. As shown in a memorandum filed in support of this motion, each such person should be excluded because of failure to comply with the requirements for jurisdiction of the subject matter imposed by Title VII of the Civil Rights Act of 1964 under which the plaintiffs seek recovery.

/s/ Laurence A. Carton
/s/ Joseph P. Carr
Attorneys for American Airlines, Inc. and Trans World Airlines, Inc.

* * (Caption—No. 70 C 2071) * *

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause before the HON. RICHARD W. MC LAREN, one of the judges of said court, sitting in his courtroom in the United States Court House at Chicago, Illinois, on the 16th day of December, A.D. 1975, at the hour of 10:00 o'clock a.m.

PRESENT:

Mr. Pressman,
Mr. Carton.

THE CLERK: 70 C 2071, In re Consolidated Pretrial Orders in the Air Line cases.

Motion for an order excluding certain persons from the class for lack of subject matter jurisdiction.

THE COURT: Can I ask how in the world a motion like this can come five years after the filing of the case?

MR. CARTON: Our position on that, your Honor, is that the matter of the jurisdictional prerequisite was discussed at length in the hearing before Judge Perry. That was on settlement. Just as soon as your Honor acquired jurisdiction, we brought before your Honor a defense. We received an opinion from your Honor indicating that there was a possibility of waiver. We were then deluged with discovery problems which plaintiffs put upon us.

Also, until the Wetzel case was handed down in January of 1975, we did not feel that the matter was clear, your Honor.

We have continued on discovery, as you know. We have had problems with respect to briefs and really until we had the refusal of certiorari in the Supreme Court, until we had just a month ago a case which said that a grievance did not toll the statute, we did not feel confident in going forward in the face of your order.

MR. PRESSMAN: Your Honor, I beg to differ with Mr. Carton. The issue has only come before any court that has ever considered this case as a statute of limitations issue, never a jurisdictional issue, that being the order, your Honor, which is attached to our brief on the motion for summary judgment—I believe it is November of '74—which refers to the statute of limitations for Title 7 actions contained in 42 U. S. C. 2000(e)(5).

You have always been led to believe by the parties on both sides here that we are dealing with a statute of limitations

problem which only affects each plaintiff individually and it is inexplicable as to why up until today we have never been confronted with anything like a jurisdictional claim.

THE COURT: I agree with you, and I can't understand it. My normal reaction would be to deny the motion and move along but you tell me it is jurisdictional and I have no right to do that.

MR. PRESSMAN: May I suggest the following: I don't believe it is jurisdictional in the Seventh Circuit. I believe that some courts have used language like that, they have used jurisdictional language while at the same time referring to the statute of limitations. In fact, in counsel's brief which he files, although he calls it jurisdiction in at least four or five places that I have noted very briefly, it is called statute of limitations in the brief. It is on page 13, for instance, where he quotes from a case called Olson v. Rembrandt Printing. You will notice the second paragraph of the quotation:

> "As we noted in Richard, to continue to construe loosely continuing discrimination would undermine the theory underlying the statute of limitations."

Again on page 11 he quotes Rue v. Philadelphia Enquirer citing Wetzel and he says:

> "Plaintiffs bringing their class action may not make use of the class action to toll the statute of limitations."

In the brief it is in four or five different places. Mr. Carton refers to this very thing which he calls jurisdictional as the statute of limitations.

On page 10, quoting from the Wetzel case, it says in this quotation:

> "Accordingly Wetzel says this tolls the statute of limitations for all members of the class."

Mr. Carton—

THE COURT: I don't think we can argue it out now. Mr. Carton has filed a brief in support of his motion and what would you like, a couple of weeks to respond?

MR. PRESSMAN: I would like to make a suggestion, your Honor, to save everybody some work here.

We have before you a summary judgment on the question of liability. After that is decided, whether it is decided in my favor or Mr. Carton's favor, there will be points of law to be cleared up.

I would suggest, as I understand that it will be ruled on shortly, I would suggest that after that is ruled on, we get together and decide what all of the issues that remain in the case are and then decide how we are going to go on this issue if we have to go at all.

You will note, your Honor, that Mr. Carton is not suggesting that this Court doesn't have jurisdiction of the entire matter.

THE COURT: I understand that.

MR. PRESSMAN: It is just individual claims. So the liability question still remains in the case even though he has filed a brief on jurisdiction.

So we must have a decision on that in any event and I would suggest that since we are so far along on that, we get a ruling on it so that we know where we are and then we will decide whether this has to be briefed and to what extent.

THE COURT: You would continue his motion until after the decision on the summary judgment motion?

MR. PRESSMAN: Yes, your Honor, I would, and for another reason:

If we are going to have a hearing—if we are going to have to get into this issue, there may be some factual issues raised here

and so on. I can see in reading it quickly last night that it raises some and I don't know to what extent at this moment.

So I think in terms of judicial economy, it would be much better to get as quickly as possible under the circumstances a ruling on that.

THE COURT: Do you have any comment on that, Mr. Carton?

MR. CARTON: I am not arguing, your Honor, the priority of their motion over our motion. We did feel that it was important to have this question, this problem before your Honor before a decision was made on the motion for summary judgment, but if you—

THE COURT: Of course this would affect only a relatively small proportion of the people on the plaintiffs' side, as I understand it.

Is that correct?

MR. CARTON: There are still, I think, a substantial number.

For example, I figured out that there were 64 American stewardesses that might still be members of the class.

MR. PRESSMAN: No, your Honor.

THE COURT: That would be affected by this motion?

MR. CARTON: That would remain members of the class if you granted the motion.

MR. PRESSMAN: Your Honor, that is not—

THE COURT: You mean would be knocked out?

MR. CARTON: I think that we have a problem there because we are not clear as to what the class should be.

In other words, we have not attacked the individual people in the class at this point and we have collected file jackets for approximately 300 American stewardesses. So that means

possibly that you would have as many as 240 of those knocked out.

THE COURT: So this might be the greater number and in going ahead and deciding the summary judgment motion, and so on, we might be attending the tail instead of the dog.

MR. CARTON: That's what I feel.

MR. PRESSMAN: Your Honor, may I reply to that?

Mr. Carton has got it just backwards. As long as we are talking about tails, the fact of the matter is that if this motion—even if his motion were granted, I think that no more than 10 per cent of the American Air Lines class would be knocked out and perhaps even less than 10 per cent. Mr. Carton simply doesn't understand, I think, the question of notice, the question of who may file with the EEOC for a class and there are people who have filed with the EEOC who are not at this moment class representatives back as early as 1967 in which case we have a very, very—we have almost the entire class here and I am very confident, your Honor, that in the case of American the class will be very near the total number of file jackets, and, as a matter of fact, will exceed the number of file jackets which Mr. Carton has presented, and in the case of TWA it will be somewhat less.

THE COURT: All right. Mr. Carton has indicated no great opposition to the procedure you suggest so we will continue his motion until after the disposition of the summary judgment motion at which time it will be taken up and there will be a briefing schedule established.

Incidentally, Mr. Carton, I notice that you have got a 24-page brief here. Now we have got a 15-page rule. I like to have people come in and ask ahead of time to have leave to file an over-length brief.

MR. CARTON: I am sorry, your Honor.

THE COURT: I will grant you leave to file the over-length brief and the other side can have an equal length of brief for its answer.

MR. CARTON: For the record, the plaintiff Alsa I believe has already stated its position. We [they] do not choose to seek permission to file a brief on this question.

THE COURT: All right.

MR. CARTON: Thank you, your Honor.

MR. PRESSMAN: Thank you.

Rec. No. 81

* * (Caption—Nos. 2069, 2071) * *

MOTION FOR ORDER ESTABLISHING BRIEFING SCHEDULE ON JURISDICTION MOTION

(Filed March 16, 1976)

On December 15, 1975, defendants American Airlines, Inc. and Trans World Airlines, Inc. filed a motion for the entry of an order excluding from the plaintiff class all flight attendants (a) whose employment was terminated before March 1, 1970 because of pregnancy and (b) who failed to comply with the provision of the Civil Rights Act of 1964 requiring a charge complaining of such termination to be filed with the EEOC within ninety days thereof. Defendants filed a memorandum in support of their motion.

On December 16, 1975, Judge McLaren entered the following minute order:

> Leave is hereby granted to the defendant to file a brief in excess of 15 pages. The motion for the exclusion of certain persons of the class for lack of subject matter jurisdiction is entered and continued until after the court rules on plaintiffs motion for summary judgment and at that time a briefing schedule will be established re: the motion to exclude.

It has been held in many cases that once an issue of jurisdiction has been raised, it should be disposed of before any consideration of the merits. In *Safeguard Mut. Ins. Co.* v. *Commonwealth of Pa.*, 372 F. Supp. 939 (E. D. Pa., 1974) the court said (p. 946):

> The authority of a judge to reconsider a previous ruling of a prior judge, sitting on the same case in the same Court, is well settled. Helvering v. Hallock, 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 604 (1940); TCF Film Corporation v. Gourley, 240 F. 2d 711 (3rd Cir. 1957); Ward v. Louisiana Wild Life and Fisheries Commission, 224 F. Supp. 252 (E.D. La. 1963).
>
> We think this principle is particularly sound with respect to ruling on jurisdictional questions. Moreover, when a Federal District Court decided that jurisdiction is lacking, at any time after a suit is brought, it has no authority to proceed further with an adjudication of the issues on their merits; the Court must dismiss the suit.

See *Joyce* v. *U. S.*, 474 F. 2d 215, 219 (3 Cir. 1973); *Bell* v. *United States*, 31 FRD 32, 36 (D., Kansas, 1962).

If defendants' jurisdiction motion is granted,* the scope of the litigation would be changed considerably. Attached is an affidavit for each airline. They show that out of 439 possible class members in the TWA case, only 17 would remain within the jurisdiction of the court if the motion is granted. Similarly, in the American Airlines case, out of 312 possible class members there would remain 74 class members. As shown in the exhibits accompanying the affidavits, the claims of many of these remaining "class members" may be subject to disallowance.

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* Defendants' motion is supported by the recent decision of the Seventh Circuit in *Evans* v. *United Airlines*, ____ F. Supp. ____, 11 EPD ¶ 10665 (1976), a similar case involving discharge of a stewardess.

Defendants respectfully request the court to resolve the issue of jurisdiction prior to a resolution of the motion for summary judgment, and to establish a briefing schedule on the jurisdiction motion.

/s/ Laurence A. Carton
/s/ Joseph P. Carr
Attorneys for American Airlines, Inc. and TransWorld Airlines, Inc.

AFFIDAVIT

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

Doris Owen, being first duly sworn, on oath deposes and says:

1. Affiant is employed by Trans World Airlines, Inc. (TWA) as a supervisor of flight attendants and is stationed at its Los Angeles base. Since 1954 she has held various TWA management positions, all of which involved the use of and familiarity with personnel policies and records relating to flight attendants.

2. On July 8, 1975, there was filed in this Court, Case No. 70 C 2071, my affidavit dated July 2, 1975. Attached to said affidavit was a list of former TWA flight attendants whose employment was terminated subsequent to July 2, 1965, because of pregnancy related reasons as defined in plaintiffs' first set of interrogatories. That list was prepared by me from TWA records as described in said affidavit. In paragraph 4 of said affidavit I said that it included the names of all possible class members to the best of my knowledge.

3. During the period February 24-26, 1976, I reviewed all personnel records of TWA flight attendants stored at the court designated depositary at Room 4600-First National Plaza, Chicago, including files and kardexes. I telephoned the TWA Kansas City archives to verify questionable dates. I then prepared attached list (Exhibit A) containing all the names on the above mentioned list. I have made inquiries of those in charge of TWA flight attendant records and believe that attached list constitutes all of the possible class members who have been brought to the attention of the Company and for whom it has records. The list shows for each name the last day worked, and the reason for removal from flight attendant status, all according to the records.

/s/ Doris Owen
Doris Owen

Subscribed and sworn to before me this 26th day of February, 1976.

/s/ Elizabeth M. Wright
Notary Public

Exhibit A

LIST OF TWA FLIGHT ATTENDANTS

(70 C 2071)

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Jean Adams	2-13-69		Resignation	Adoption
Kendra Adams	6-30-67		Pregnancy	
Sarah L. Adams	7-22-69		Pregnancy	
Elizabeth Ahlers	3-25-66		Pregnancy	
Noela Aldort	6-20-68		Pregnancy	
Judith A. Anderson	9-12-66		Pregnancy	
Carolyn S. Anderson	2- 1-66		Pregnancy	
Suzanne M. Andrews	4-15-68		Pregnancy	
Kora A. Arnell	4- 1-68		Pregnancy	
B. Vivien Ambler	6-21-68		Resignation	Personal
Rachel V. Atkins	11-29-67		Pregnancy	
Judith V. Atwood	7-28-69		Pregnancy	
Deanne E. Avant	11- 1-67		Pregnancy	
Roberta Avery	12-22-69		Pregnancy	
Pauline H. Bacchi	1-16-69		Resignation	To be a full time housewife
Karen J. Bailey	12- 9-65		Pregnancy	
Barbara Baldwin	2-25-65		Pregnancy	
T. S. (Margaret) Ball	10-23-66		Pregnancy	
Sharon P. Bands	8-16-68		Pregnancy	
Sandra Barnett	3-26-69		Resignation	Unknown reason
Priscilla Barron	12-18-66		Pregnancy	
Karen L. Bartholio	9- 2-66		Resignation	Unknown reason
Patricia K. Batza	2-15-67		Pregnancy	
Sherrill A. Beaman	12-20-68		Pregnancy	
Tamara Beeler	5- 7-70	*	Pregnancy	Returned as F/A from maternity leave 4/6/71
Linda J. Banjamin	6-22-66		Resignation	Unknown reason
Kathleen B. Bergmann	12-11-68		Pregnancy	
Sandra Berkowicz	2-18-69		Pregnancy	
Audrey Bird	2- 5-69		Pregnancy	
Mary Biver	7-10-68		Pregnancy	
Barbara Black	4-22-66		Pregnancy	
Gretchen McCurdy Boardman	5- 2-67		Pregnancy	
Rita Boaz	6- 2-68		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Arlene Bodney	4-25-69		Pregnancy	
Mary Boehmer	12-23-68		Pregnancy	Concealment
Mary Bohn	3-31-66		Voluntary termination	Unknown reason
Ethel Bonar	9-17-67		Pregnancy	
Sharon Bongard	5-21-67		Pregnancy	
Connie Bowers	9-30-68		Personal	Management employee
Kathleen Bowery	2-12-67		Pregnancy	
Karla Boynton	3-26-69		Pregnancy	
Patricia Brandenburg	11-17-69		Pregnancy	
Jane Bregstein	4- 1-69		Pregnancy	
Carol Brent	6-19-67		Pregnancy	
Jacqueline Bridge	12-13-66		Pregnancy	
Deborah A. Brown	3-23-67		Pregnancy	
Janet Reibolt Brown	No information—See 7/2/75 affidavit of Doris Owen			
Diana K. Brown	10-26-66		Pregnancy	
Saundra E. Brown	1-19-70		Discharged	Poor performance
Janett Buell	2-14-65		Pregnancy	
Sharon Buell	4- 6-68		Pregnancy	
Denyse Burns	7-23-66		Pregnancy	
Janice Buvinghausen	3-15-67		Pregnancy	
Irene Cain	11-15-69		Pregnancy	
Sydney R. Cain	3-17-69		Pregnancy	
Helen Camerlingo	9-30-66		Pregnancy	
Jean N. Carlino	7-28-69		Pregnancy	
Christine Carlson	8- 5-68		Pregnancy	
Joan Carlson	7- 2-65		Pregnancy	
Linda Catalina	9- 3-68		Pregnancy	
Nancy Chapa	3- 5-69		Resignation	Marriage
Martha-Chapman	9-27-67		Pregnancy	
Barbara Chevigny	10-20-67		Pregnancy	
Joan Childress	11-12-65		Pregnancy	
Hope Clark	1-14-68		Pregnancy	
Kendall Clarke	4- 1-68		Pregnancy	
Karen Clark (Indovina)	8-16-68		Pregnancy	
Ann Clay	4- 7-69		Pregnancy	
Susan Closkey	3-31-66		Pregnancy	
Angela Cody	10- 7-66		Pregnancy	
Karin C. Cole	5-24-66		Pregnancy	
Carole Coleman	11- 1-65		Pregnancy	
Janet Conaty	4-13-69		Pregnancy	
Arleen Condrin	5-28-69		Pregnancy	
Carol Conrad	4-15-67		Pregnancy	
Dorothy Cooksey	3-17-68		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Neva Cotter	3- 2-70		Pregnancy	Granted maternity leave
Barbara Court	11-21-68		Pregnancy	
Felicia Coyne	4-15-68		Pregnancy	
Lorna Craig	7-24-67		Pregnancy	
Helen Shea Crean	4-10-64		Pregnancy	
Carol Crombie	4-10-69		Pregnancy	
Diana Cross	9-13-68		Pregnancy	
Rosemary Cunningham	7-15-66		Pregnancy	
Julie Cuomo	11-25-67		Pregnancy	
Alice Curran	5-13-68		Pregnancy	
Jerrlea Currigan	1- 3-67		Pregnancy	
Kendall Dahl	3- 5-66		Pregnancy	
Pamella Dailing	2-22-69		Pregnancy	
Carol Dargan	9- 6-66		Pregnancy	
Vicky Davidson	9-23-68		Pregnancy	
Rita Davis	7-31-67		Pregnancy	
Marion Day	1-24-65		Pregnancy	
Connie Debernardi	12-29-65		Pregnancy	
Margaret (DeKeyser) Tozer	5- 1-67		Pregnancy	
Virginia Dalia	6- 6-68		Pregnancy	
Sandra DeMoss	10- 5-65		Pregnancy	
Judy Dempsey	7-11-69		Pregnancy	
Regina DeWitt	6- 8-66		Pregnancy	
Marily Diamond	4-22-69		Pregnancy	
Judith Doane	4-30-69		Pregnancy	
Anne Dimott	5-23-69		Pregnancy	
Margaret Donlon	5-29-68		Pregnancy	
Elizabeth Dougherty	8-23-65		Pregnancy	
Rose Mary Dougherty	7-29-66		Pregnancy	
Jacquelyn Dow	11-22-65		Pregnancy	
DeeAnn Doxee	4- 6-66		Pregnancy	
Allison Doyle	5-21-68		Pregnancy	
Linda Dunbar	5-21-69		Pregnancy	
Celia Dunn	7-28-66		Pregnancy	
Verlee Dunn	12- 4-67		Pregnancy	
Jo A. Dwyer	8-13-69		Pregnancy	
Marilyn Echols	12-31-65		Pregnancy	
Donna Elliason Gallagher	10-18-68		Pregnancy	
Yvonne Elonick Trice	2-27-68		Pregnancy	
Renee Emery	3- 5-68		Pregnancy	
Marjorie Engelman	7-26-65		Pregnancy	
Roberta Enright	7- 7-67		Pregnancy	
Henrietta Ericson	8-30-68		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Manga Estes	6- 9-66		Pregnancy	
Carol Evans	7- 5-68		Pregnancy	
Rebecca Everitt	4- 4-69		Pregnancy	
Patricia Fairchild	6-11-68		Pregnancy	
Karen Falbo	10-11-66		Pregnancy	
Ellen Fasciano	1-26-66		Pregnancy	
Barbara Fields	6- 8-66		Pregnancy	
Janet Filip	2-15-67		Resignation	Unknown reason
Donna L. Fish	11- 1-68		Pregnancy	
Patricia A. Fleming	1-12-67		Pregnancy	
Claircine Fraser	4-10-69		Pregnancy	
Nancy Friedman	5- 2-68		Pregnancy	
Mary Frisch	1-29-69		Pregnancy	
Nancy Fulton	4-15-69		Pregnancy	
Judith Funtas	8- 3-65		Pregnancy	
Susan Gambatese	7-28-66		Pregnancy	
Karen Garcia	5-10-68		Resignation	Husband relocating at Ft. Lee, Va.
Valarie Gardner	5-18-66		Pregnancy	
Diane Gorman	8-11-67		Pregnancy	
Gay Germain	1-10-69		Pregnancy	Management employee
Diane K. Gibson	10-26-66		Pregnancy	
H. C. Giordano Keel	12- 6-68		Pregnancy	
Katherine Grayson	8-25-70	•	Pregnancy	Failed to return from maternity leave
Pamela Gruber	8-31-68		Pregnancy	
Karen Gilroy	12- 2-68		Pregnancy	
Susan Glotzer	4- 9-68		Pregnancy	Returned 5-9-68 after miscarriage
Judith Glueck	6- 2-69		Resignation	Unknown reason
Elizabeth Gonzales	8- 6-70	•	Resignation	Marriage—relocation to San Luis Obispo, California
Saundra Gordon	6-18-69		Pregnancy	
Lydia Gourvitz	7-14-68		Pregnancy	
Patricia Gray	7-10-68		Pregnancy	
Sharron Grashius	1- 8-67		Pregnancy	
Joy Guerber	4-30-69		Pregnancy	
Barbara Gunderson	9- 7-66		Pregnancy	
Carol Hafer	3-17-69		Pregnancy	
Muriel Hachadurian	8-11-64		Pregnancy	
Elizabeth Harris	9-17-64		Pregnancy	
Helene Hague	6-23-67		Resigned	
Kathleen Hallquest	3- 2-67		Pregnancy	

•

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Edith Halpern	4-30-69		Pregnancy	
Meryle Hammatt	3-23-66		Pregnancy	
Virginia Hammar	11- 7-68		Pregnancy	
Linda Harley	4-11-67		Pregnancy	
Vicki Harris	3-28-67		Pregnancy	
Diane Harvey	12- 5-65		Pregnancy	
Betty Heisler	8- 6-65		Pregnancy	
Ruthann Heitzler	3- 4-68		Pregnancy	
Janice Herbert	8-29-66		Pregnancy	
Darlene Headlee	No information - See 7/2/75 affidavit of Doris Owen			
Suzanne Hessian	6-30-67		Pregnancy	
Linda Hickey	1-19-68		Pregnancy	
Sharon Hill	10- 3-67		Pregnancy	
Virginia Hirt	9- 1-69		Pregnancy	
Sally Holbrook	6- 5-67		Pregnancy	
Arlene Holland	9- 2-65		Pregnancy	
Carol Holmes	6-27-69		Pregnancy	
Nancy Houtcooper	6-13-69		Pregnancy	
Drucilla Howard	4-19-68		Pregnancy	
Patricia Howard	6- 6-68		Resignation	Personal—resigned while in training
Barbara Huling	2- 2-66		Pregnancy	
Nancy Hoonewell	5- 2-67		Pregnancy	
Martha Hunt	12- 6-68		Pregnancy	
Carole Hunter	11- 1-67		Pregnancy	
Delores Ingemunson	7- 7-68		Pregnancy	
Karen Jacobs	9-10-67		Resignation	Unknown reason
Judith Jacobson	1-10-69		Pregnancy	
Gabriela Jeppe	6-19-68		Pregnancy	
Cherianne Johnson	1-14-66		Pregnancy	
Corma R. Johnson	4-30-68		Pregnancy	
Karen L. Johnson	2-15-67		Pregnancy	
Rosemary Kafka	12- 6-67		Pregnancy	
Sally Ingmanson	4-30-68		Pregnancy	
Mary Kalert	11-10-66		Resignation	Unknown reason
Rosalie Kampmeier	1-30-69		Pregnancy	
Valerie Kapchinski	9-11-69		Pregnancy	
Halina Karavas	9-10-67		Pregnancy	
Sandra Karge	11-15-67		Pregnancy	
Kamille Karlson	6-18-67		Pregnancy	
Josephine Kavanagh	3-12-68		Pregnancy	
Carol Kehler	5-16-67		Pregnancy	
Terryl W. Kidd	No information—See 7/2/75 affidavit of Doris Owen			
Jean F. King	1- 2-67		Pregnancy	
Julia Kirby	No information—See 7/2/75 affidavit of Doris Owen			

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Nancy Kisseljack	7- 7-66		Pregnancy	
Erica Klein	11- 7-68		Pregnancy	
Sandra Knight	1- 4-67		Pregnancy	
Jacqueline Knott	8-23-68		Pregnancy	
Francie Knox	2-14-69		Pregnancy	
Jeanette Koestner	6-18-68		Pregnancy	
Carol Kropp	1-30-68		Resignation	Unknown reason
M. J. Kuhlman	9-21-66		Pregnancy	Never was a flight attendant
Sadie S. Lake	3-24-69		Pregnancy	
Joan Laux	12- 7-67		Pregnancy	
Sandra LaCroix	10- 2-65		Pregnancy	
J. C. Lake	No information—See 7/2/75 affidavit of Doris Owen			
Brunhilde Leeper	3- 5-69		Pregnancy	
Lorna Leonard	12-15-65		Pregnancy	
Diane Lichy	7-16-68		Pregnancy	
Elizabeth Lidstone	3-29-68		Pregnancy	
Rita Liedtke	1-31-68		Pregnancy	
Yolanda Lokey	1- 6-68		Pregnancy	
Beverly Lovejoy	3-25-68		Pregnancy	
Myra Lubeck	2- 3-66		Pregnancy	
Susan Madigan	10-28-68		Pregnancy	
Diana Manahan	8- 2-68		Pregnancy	
Sherry Mangan	2-21-68		Pregnancy	
Patricia Markou	8-22-66		Resignation	
Joan Martinez	7-16-69		Pregnancy	
Rosemarie Mattson	8-20-66		Pregnancy	
Patricia McCarthy	5-18-66		Pregnancy	
Barbara McCravey	9- 1-65		Resignation	Unknown reason
Esther McDermott	8-25-65		Pregnancy	
Lloreen McFadyen	3- 7-68		Pregnancy	
Dorothy McGargill	7-10-69		Pregnancy	
Helen McGauly	7-21-69		Pregnancy	
Joyce McGrath	6- 6-66		Pregnancy	
Judith McInerney	NONE			Active flight attendant since 5-21-62
Jean McIntosh	10-26-66		Pregnancy	
Elizabeth McNamara	8- 9-65		Personal leave of absence	Unknown reason
Patricia McNamara	6-18-68		Pregnancy	
Jill Meyer	2- 7-68		Pregnancy	
Deanna J. Meyer	5-23-67		Pregnancy	
Ellen Mildenberger	12-29-68		Pregnancy	
Pauline Miller	No information—See 7/2/75 affidavit of Doris Owen			

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Frances Minnozzi	8-31-68		Pregnancy	Management employee
Tamillee Moore	5- 7-69		Resignation	Husband wanted her to stay home
Patricia Moore	9- 5-68		Pregnancy	
Virginia Mitcham	10-16-66		Pregnancy	
Ann Molsky	7-12-66		Pregnancy	
Delores A. Moore	7-8-68		Pregnancy	
Carol Moran	10-27-68		Pregnancy	
Susan Moran	4-30-68		Pregnancy	
Patricia Morgan	8-26-68		Pregnancy	
Katherine Morvay	3- 1-66		Resignation	Unknown reason
Carol Munz	4- 1-66		Personal leave of absence	Unknown reason
Emily Murphy	12- 8-68		Pregnancy	
Ruth Muto	6-28-68		Pregnancy	
Frances Nevin	10-28-66		Pregnancy	
Nelda Newby	9-13-65		Pregnancy	
Dennece Newman	12- 2-66		Pregnancy	
Edeltraud Newman	10-13-68		Pregnancy	
Susan Newell	11-30-69		Pregnancy	
Gwendolyn Newton	5- 6-66		Pregnancy	
Judith Novinger	4-16-67		Pregnancy	
Jeannette Oaks	8-30-67		Pregnancy	
Carolyn S. O'Brien	9- 8-67		Pregnancy	
Karen L. O'Byrne (Shine)	6-19-69		Pregnancy	
Carol J. Olson	4- 8-68		Pregnancy	
Gail O'Shea	6-12-68		Pregnancy	
Barbara Overly	3- 2-66		Pregnancy	
Diane Paglio	5- 2-69		Pregnancy	
C. June Panaia	3-29-66		Pregnancy	
Anne Panettiere	6-11-69		Pregnancy	
Kathleen Pantos	6-24-69		Pregnancy	
Lydia Parker	6-13-69		Pregnancy	
Sandra Paul	11- 4-66		Pregnancy	
Nickcol Peters	9- 3-68		Resignation	Unknown reason
Lana Copeland Palmer	10-26-68		Pregnancy	
Jody A. Peterson	10- 7-67		Resignation	Unknown reason
Jo D. Peterson	7- 1-68		Pregnancy	
Thomasine Phillips	3-25-68		Pregnancy	
Barbara Poeum	7-31-67		Pregnancy	Management employee
Mary Pitko	12- 6-67		Pregnancy	
Theresa Poulton	6-28-69		Pregnancy	
Angela Price	11-16-68		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Frances Pritchett	6-30-65		Pregnancy	
Patricia Pyle	1-30-66		Pregnancy	
Barbara Porter	9-29-69		Resignation	Desires to remain at home
Elizabeth Prasek	6-30-68		Resignation	Does not wish to travel
Kay Piscitello	1- 9-67		Pregnancy	
Cynthia A. Quinn	4-21-68		Resignation	Adoption
Sabine Ralston	3-17-67		Resignation	Unknown reason
Linda Reichenstein	4- 6-68		Pregnancy	
Janice H. Reilly	3-14-67		Pregnancy	
Jacqueline Reyburn	1- 5-66		Pregnancy	
Jean A. Rice	11-19-70	*	Termination	Reduction in force
Bonnie Rickenbacher	6-20-66		Pregnancy	
Debby Riley	11-29-68		Pregnancy	Signed rehire waiver
Regina Roberts	7- 1-68		Resignation	Adoption
Sharon Roberts	1-23-68		Pregnancy	
Ingrid Robins	12- 9-69		Resignation	
Judith Rogers	10-19-66		Pregnancy	Signed rehire waiver
Patricia Roumpos	12- 5-66		Pregnancy	
Grace Romeo	11-18-66		Pregnancy	
Sandra Roth	3-31-69		Pregnancy	
Marcia Rowe	7-17-69		Pregnancy	
Susan Rudd	8- 6-66		Pregnancy	
Mary Ann Ryan	8- 9-67		Pregnancy	
Marsha Sanabria	5-26-69		Pregnancy	
Patricia Santini	12-12-68		Pregnancy	
Bonnie Scahill	7-24-67		Pregnancy	
Sharon Schlund	4-22-69		Pregnancy	
Rita Schmidt	10-18-67		Personal leave	Unknown reason
Ursula Schneider	12-12-66		Pregnancy	
Pamela Schoenwitz	10-10-66		Pregnancy	
Gay Schneiderman	3-27-69		Pregnancy	
Jeanne Schoenberger	12-16-65		Pregnancy	
Janet Schramm	1-30-66		Pregnancy	
Susan Schreib	6- 6-69		Pregnancy	
Bonnie Schwartzburg	7-17-65		Pregnancy	
Catherine Schutz	10-15-65		Pregnancy	
Ida Louise Scott	9-17-68		Personal	
Joanne Securro	6- 7-68		Pregnancy	
Mary Seeger	4- 1-69		Pregnancy	
Barbara Semanchik	5-24-67		Pregnancy	
Harriette Shaffner	8-29-66		Resignation	Adoption
Ann Shaughnessy	3- 3-67		Pregnancy	
Mary Ann Shaw	6-20-69		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
June M. Sheetz	4-20-69		Pregnancy	
Ann Shepard	4-29-66		Pregnancy	
Cynthia Shipman	7-13-65		Pregnancy	
Karen Sikora	8-11-67		Pregnancy	
Nancy Sipe	5-24-67		Pregnancy	
Betty Smith	4-10-69		Pregnancy	
Margaret Smith	11- 1-66		Pregnancy	
Norine Smock	4-16-68		Pregnancy	
Ann Smyer	11-15-67		Pregnancy	
Joy Spieker	8-22-66		Pregnancy	
Maureen Spillane	11- 7-66		Pregnancy	
Signa Spohn	5-31-67		Pregnancy	
Barbara Spudeck	6-20-66		Pregnancy	
Shirley Stevens	1-21-68		Pregnancy	
Frances Stewart	12-11-66		Pregnancy	
Sandra Stewart	11-24-68		Pregnancy	
Marlene Stringer	9-19-66		Pregnancy	
Barbara Stuart	8-19-66		Pregnancy	
Sarah Suenram	8-30-68		Pregnancy	
Ruthann Steimetz	10-18-66		Resignation	Unknown reason
Patty Rae Sumner	1-17-67		Resignation	Unknown reason
Joyce Sutton	6-15-69		Pregnancy	
Hannelore Suydam	3- 6-68		Pregnancy	
Frances Swift	5-13-69		Pregnancy	
Karla Swiontek	3-31-69		Pregnancy	
Natalie Tar	2-23-67		Pregnancy	
Mary Telep	9-13-68		Pregnancy	
Francoise Terra	12- 4-67		Pregnancy	
Aloma Thomas	8-30-65		Pregnancy	
Charlotte Tiesman	12- 4-67		Pregnancy	
D. Traylor	No information—See 7/2/75 affidavit of Doris Owen			
Bridgette Tilg	11-19-68		Pregnancy	
Bonnie Tourville	6-19-67		Pregnancy	
Margaret Townsend	12- 1-66		Pregnancy	
Sharon Townsend	6-30-69		Pregnancy	
Mary Tranbargar	8-11-67		Pregnancy	
Patricia Tucker	3-16-69		Pregnancy	
Patricia Tuens	5-25-66		Pregnancy	
Judy Turpin	8-10-65		Pregnancy	
Barbara Tuttle	12-25-66		Pregnancy	
Catherine Ufferfilge	10-31-65		Pregnancy	
Ann Urbach	11- 1-67		Pregnancy	
Cathleen Vail	8-10-68		Pregnancy	
Annerose Valensi	4-29-68		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Cynthia Vanderford	7- 1-68		Pregnancy	
Suzanne Vandersluis	2-27-68		Pregnancy	
Marsha Via	9-12-68		Pregnancy	
Priscilla Voight	1- 3-68		Personal leave	To obtain ground position
Judy Wade	6-30-69		Pregnancy	
Patricia Wallace	5- 1-68		Pregnancy	
Pamela Wagner	2- 7-68		Pregnancy	
LaVern Wayman	6-14-68		Pregnancy	
Katherine Weiss	1-17-67		Pregnancy	
Jyette Wells	2-27-67		Pregnancy	
Nancy Wells	10-29-65		Pregnancy	
Patricia West	5- 7-69		Pregnancy	
Lois Williams	3-31-68		Pregnancy	
Mary Williams	10- 1-66		Pregnancy	
Rosemary Williams	1- 6-66		Resigned	Husband wanted her at home
Elizabeth Williamson	3-27-67		Pregnancy	
Marylynn Willow	10-21-69		Pregnancy	
Marcella Winterhalter	2- 3-69		Pregnancy	
Kerry Wobeser	3-31-67		Pregnancy	
Karen Wood	No information—See 7/2/75 affidavit of Doris Owen			
Cheri Woulfe	1- 7-69		Pregnancy	
Bonnie Yoder	7- 7-70	*	Termination	Concealment
Donna Wurtz	9-21-67		Pregnancy	
Jessica Zajicek	3- 6-69		Pregnancy	
Donna Zimmerman	4- 5-66		Pregnancy	
Sherianne Zinsner	3-18-68		Pregnancy	
Anne Zipes	8- 4-68		Pregnancy	
Elizabeth Zlatchin	8- 7-70	*	Pregnancy	Granted maternity leave
Bernadette Zola	7-13-65		Personal leave	Unknown reason
Sieglinde Ziegler	10-31-66		Resignation	Return to Germany
Marcia Deeter	5- 2-69		Pregnancy	Management employee
Donna Deftrerick	No information—See 7/2/75 affidavit of Doris Owen			
Martha De Trindad	12-18-70	*	Pregnancy	Granted maternity leave. Voluntary termination 9-17-71
Susan Towle	10- 4-69		Pregnancy	
Sherry Ogden Quinby	No information — See 7/2/75 affidavit of Doris Owen			
Brenna Schoeler	8-17-69		Personal leave	Unknown reason
Bryde Giles	5-10-66		Pregnancy	

Name	Last Day Worked	After 3/1/70	Reason for Removal From Flight Attendant Status	Comment
Linda Melton	10- 6-70	•	Pregnancy	Granted maternity leave. Failed to return
Bernadette Montemurro	5-24-67		Pregnancy	
Joanne E. Bach	2-20-70		Pregnancy	
Ethel Hosmer Bergwold	10- 4-71	•	Furloughed	Reduction in force
Gloria Bobski	11-21-68		Pregnancy	Management employee
Lynn A. Brooks	8-18-67		Pregnancy	
Maureen J. Connolly	8- 4-69		Pregnancy	
Kathleen Fountain	1-30-72	•	Pregnancy	Was never a Flight Attendant—Sr. File Clerk New York City Legal
Patsy Giles Havice	3-22-69		Pregnancy	
Janice Hall	3- 2-70	•	Pregnancy	Granted maternity leave
Mariann H. Hatches	12-16-69		Pregnancy	
Joan Iswall	No information—See 7/2/75 affidavit of Doris Owen			
Linda J. Kerr	6-29-70	•	Pregnancy	Granted maternity leave
Diane W. Lafata	5-31-70	•	Pregnancy	Granted maternity leave
Diane Moska	No information—See 7/2/75 affidavit of Doris Owen			
Janice B. O'Neill	6-19-70	•	Pregnancy	Granted maternity leave
Janet T. Sauer	6-15-70	•	Pregnancy	Granted maternity leave
Gilma Gi Gi Schmidt	10-11-68		Pregnancy	
Beatrice Jaacks Sultan	9-29-64		Pregnancy	
Linda Thomas	12-29-69		Pregnancy	Management employee
Edeltrand Kunz Tichy	10-15-69		Pregnancy	
Ruby Townsend	No information—See 7/2/75 affidavit of Doris Owen			
Jo Ellen Vogelgesang	11-17-69		Pregnancy	
Bette Williams	12-29-67		Resignation	To be full time housewife management employee
Alice G. Wright	6-28-69		Pregnancy	
Miriam Kulman Brown	6- 9-70	•	Pregnancy	Granted maternity leave. Returned 5-23-71
Ellen M. Harris	4- 7-66		Resignation	Unknown reason
Kathleen Mary Wood	No information—See 7/2/75 affidavit of Doris Owen			
Amy Shepard	5-19-69		Resignation	Unknown reason
Barbara Ruther	4-11-66		Resignation	Unknown reason
Pamela Wagner	Listed above			

Rec. No. 97

PORTIONS OF TWA EMPLOYMENT RECORD OF PATRICIA A. SANTINI

December 13, 1968

To the Hostess Department:

This is to notify you that due to pregnancy I am required by the company to submit my resignation from the hostess department.

At this time, I would also like to inform you that I shall be taking the twelve (12) months maternity leave of absence which the company allows the hostesses to take.

Respectfully Submitted,

/s/ Patricia A. Santini
Patricia A. Santini
Payroll No. 32431

Also, it may be necessary for Payroll Department to hold your paycheck for the period ending December 29, 1968 for final accounting purposes due to your termination.

We would like to take this opportunity to wish you success and happiness in the future.

/s/ Maribeth Endom
Maribeth Endom
Transportation Manager, Hostesses

cc: G. B. Koch
W. S. Borden
J. V. Dernedde
Payroll
Medical

TRANS WORLD AIRLINES, INC.

To: Pat Santini 32431
1895 Pacific Ave. No. 105
San Francisco, Calif.

From: Maribeth Endom
Int'l Airport
San Francisco
Date: December 27, 1968

Subject: Termination

This will confirm your resignation from the Hostess Department of TWA effective December 12, 1968, due to your pregnancy. As requested, you have been granted a twelve (12) month Maternity Leave of Absence to seek ground employment.

I would like to remind you that the life insurance portion of your policy may be converted to a personal policy if handled within thirty (30) days from the effective date of leave. You may personally contact a representative of the Connecticut General Life Insurance Company for this purpose.

For your information, you are due zero days vacation pay for 1967 and thirteen days vacation pay for 1968.

Attached is a listing of uniform equipment which should be returned as soon as possible after your effective date of leave. The items listed should be brought into the Hostess Office for inspection before being surrendered to Stores Department.

I would like to remind you that G-118s reflecting any non-routine expenses should be submitted as soon as possible. G-118s received by Payroll more than 60 days late require the approval of a Company official and if more than 90 days late will not be reimbursed.

Passes that you have in your possession that are valid for more than 30 days from your effective date of leave must be turned in to this office for re-issuance.

FOR NEW EMPLOYEE: Complete top line of EACH block except shaded areas.
FOR CHANGE OF STATUS: Fill in changed information only directly below item(s) to be changed. Make no entries for unchanged items or in shaded areas.

TRANS WORLD AIRLINES, Inc.
EMPLOYEE STATUS

☐ NEW HIRE ☐ STATUS CHANGE ☐ REHIRE ☒ LEAVE ☒ TERMINATION

② No. A920675

DATE PREPARED: ~~1/17/68~~ 2/10/71

REGISTER NUMBER	EMPLOYEE FIRST NAME	FIRST INIT	SEC. INIT	EMPLOYEE LAST NAME	BIRTH DATE MO	DAY	YR	SEX	ADDRESS NUMBER AND STREET	ADDRESS (APT., COURT, ETC.)	CARD CODE
32431	PATRICIA	P	A	SANTINI	03	02	42	F	1895 PACIFIC AVE	#104	1

ADDRESS CITY AND STATE	ZIP CODE	SOCIAL SECURITY NUMBER	W.C. DIV.		REPO STATE	EARNED STATE STATUS	DIV	INSUR.	ADDIT	FUND EXEMP.	CO. SENIORITY MO	DAY	YR	LONG. DATE MO	DAY	YR	VACATION DATE MO	DAY	YR	ADD. EXEMP. NO.	YR	OCC TAX		CARD CODE
SAN FRANCISCO CALIF	94109	311-42-4777	Y		CA	E00	1				06	11	62							00				2

EFFECTIVE DATE MO	DAY	YR	JOB NUMBER PRE	TITLE	GRD	MGMT ACCT	CAB ACCT	JOB I.D	M/S	SHIFT	PAY BASIS	BI-WEEKLY SEMI-MO.	MONTHLY OR HRLY BASE PAY	HOURLY ACC RATE	LOCATION	R/N	COST CENTER	CT TX STAT	CITY EXM	STATE EXM	FED EXM	M/S	NO HS	COMP CLASS	PAY PERIOD WRK MO	PER	YR	CARD CODE
07	15	68	3	188	CC	211	55240	03	F		N	026006	565.00	7.45	890	0	916	000		00	01	M		4	07	16	68	3

JOB SENIORITY MO	DAY	YR	PAY SENIORITY MO	DAY	YR	INCR DECR	MERIT	PROM	SERVICE	S C A	LONG. RATE	AMOUNT INC DECR	BACK PAY DAYS	O S A	OVS SER. PAY	OLSB PAY	CLD PAY	CREW CODE	FLT SEN	RET	CARD CODE
			07	19	62	A						9.21									4

LAST DAY WORKED MO	DAY	YR	LV EXPR DATE MO	DAY	YR	MED	TERMINATION PAY DAYS	HOL	OTHR	SHIFT	VAC	CARD CODE
8	12	68	12	11	69	E						5

COMPLETE FOR HOURLY CONTRACT PERSONNEL ONLY

ACT LEAD	START TIME	LCH	DAYS OFF	FUNC. CODE	REG CRD	CLK NO	COLONY

REMARKS: Employee granted twelve month maternity leave of absence pending transfer to ground position. Vacation earned 1967 taken, thirteen days accrued 1968. Eligible for rehire in any position for which qualified. All loan items returned. Failed to return from maternity leave

DUTIES FORMERLY PERFORMED BY: Flt Hostess

FORM W-4 ATTACHED: ☐ YES ☒ NOT REQUIRED

PRIOR
JOB TITLE: Flt Hostess — DEPARTMENT: Sales/Services
SECTION — LOCATION: San Francisco — PAY: $565.00 2/10/71

NEW
JOB TITLE — DEPARTMENT
SECTION — LOCATION — PAY

APPROVALS

Mgr. Inflight Services 1/17/68

Muriel Eden

TITLE — DATE — TITLE — DATE

FORM A-76-A (11-68) PRINTED IN U.S.A.

FOR NEW EMPLOYEE: Complete top line of EACH block except shaded areas.
FOR CHANGE OF STATUS: Fill in changed information only, directly below item(s) to be changed. Make no entries for unchanged items or in shaded areas.

TRANS WORLD AIRLINES, Inc.
EMPLOYEE STATUS

④ No. B 542020

☐ NEW HIRE ☐ STATUS CHANGE ☐ REHIRE ☐ LEAVE ☒ TERMINATION

DATE PREPARED: 2/10/71

REGISTER NUMBER	EMPLOYEE FIRST NAME	FIRST INIT	MID. INIT	EMPLOYEE LAST NAME	BIRTH DATE MO	DAY	YR	SEX	ADDRESS NUMBER AND STREET	ADDRESS (APT., COURT, ETC.)	CARD
[redacted]	PATRICIA	P	A	SANTINI	03	02	42	F	1895 PACIFIC AVENUE	#105	1

ADDRESS CITY AND STATE	ZIP CODE	SOCIAL SECURITY NUMBER	U.S. CITIZ	RESD STATE	EARNED STATE STATUS	DIV	INSUR	ADDIT	FUND DEDUC	CO. SENIORITY MO	DAY	YR	LONG. DATE MO	DAY	YR	VACATION DATE MO	DAY	YR	ADD EXEMP NO.	YR	OCC TAX	RES STATE EXM	FICA EX		CARD
SAN FRANCISCO CALIF	94109	111-42-4777	Y	[redacted]	[redacted]	1				06	11	62							00						2

EFFECTIVE DATE MO	DAY	YR	JOB NUMBER PRE	TITLE	SUF	MGMT ACCT	CAB ACCT	JOB I D	H S	SHIFT	CALL CODE	BI-WEEKLY SEMI-MO.	MONTHLY OR HRLY BASE PAY	HOURLY ACC RATE	LOCATION	R N	COST CENTER	CY TX STAT	CITY EXM	STATE EXM	FED EXM	M S	NO HS	CONC CLOSE	DATE FORM WRKD MO	DAY	YR	LOC DIV	CARD
07	15	69	3	100	00	211	55240	00	F		W	086006	565.00	7.65	890	0	916	000		00	01	M	4		07	16	68		3

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COMPLETE FOR HOURLY CONTRACT PERSONNEL ONLY

ACT LEAD	START TIME	LCH	DAYS OFF	FUNC. CODE	REG CRD	CLK NO	COLONY

REMARKS: Failed to return from maternity leave of absence.

DUTIES FORMERLY PERFORMED BY: _____

FORM W-4 ATTACHED: ☐ YES ☒ NOT REQUIRED

PRIOR
JOB TITLE _____ DEPARTMENT _____
SECTION _____ LOCATION _____ PAY _____
APPROVALS

NEW
JOB TITLE _____ DEPARTMENT _____
SECTION _____ LOCATION _____ PAY 10 38 X
APPROVALS

_____ TITLE Mgr. In-Flight Services 2/10/71 TITLE _____ DATE _____

Marilyn Endom TITLE _____ DATE _____ TITLE _____ DATE _____

FORM A-76-A (8-69)

PRINTED IN U.S.A.

Rec. No. 86

* * (Caption—No. 70 C 2069) * *

MEMORANDUM OPINION AND ORDER

(American Airlines Defendant)

(Entered April 28, 1976)

This cause comes before the Court on plaintiffs' motion for summary judgment. The complaint alleges that, prior to October 9, 1970, women employed by defendant American Airlines, Inc., ("American") as flight cabin attendants ("stewardesses") were forced to resign or were discharged when they became pregnant, and were refused opportunity to continue in their positions as stewardesses at any time following their pregnancies. The complaint further alleges that, during the time in question, defendant American did not terminate the employment of its male employees who fathered children. Plaintiff challenges American's policy and practice of terminating the employment of its stewardesses upon pregnancy and refusing to rehire said stewardesses after pregnancy (hereinafter referred to as the "no pregnancy/no motherhood policy") as violative of Title VII of the Civil Rights Act (42 U. S. C. § 2000e, *et seq.*).

There seems to be no question concerning the basic facts of the case as elicited from the various pleadings, affidavits and discovery documents. Prior to October 9, 1970, stewardesses who became pregnant were terminated from employment and, thereafter, could not serve as American stewardesses.[1] However, during the same period of time, American did not have a policy limiting the employment opportunities of male flight crew members who were parents.

Plaintiffs and defendant both rely on the Supreme Court's per curiam opinion in *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971). In *Phillips*, the Court said, "Section 703(a)

[1] After this suit was filed, through collective bargaining, the no pregnancy/no motherhood policy was abandoned and, since October 9, 1970, female parents have been employed by American as stewardesses.

of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex." 400 U. S. 542, 544.

Plaintiffs rely on the Court's statement for affirmance of the establishment of a prima facie case against defendant for violation of § 703(a) of the Civil Rights Act. Defendant, however, argues that pregnant females do not have the same qualifications as men or non-pregnant females to do the work of stewardesses. Thus defendant urges this Court that plaintiffs have not shown a violation of § 703(a). The Court agrees that pregnant women do not have the same qualifications as men or as non-pregnant women to work as flight cabin attendants. The Court accepts as non-discriminating the policy that pregnant women should not work as stewardesses. And like plaintiffs, the Court sees no problem with American's present policy of requiring a stewardess to take a leave of absence immediately upon confirmation of her pregnancy. However, the issue in this case is not whether pregnant women are qualified to serve as stewardesses. The issue is whether female parents as a class have been subjected to employment impediments to which male parents have not been subjected. The Court finds from the uncontroverted facts that female parents were subjected to such impediments in this instance; and based on the Supreme Court's decision in *Phillips* v. *Martin Marietta Corp., supra,* the Court finds that such discrimination establishes a violation of § 703(a). See also, *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632 (1974), and *Sprogis* v. *United Air Lines, Inc.,* 444 F. 2d 1194 (7th Cir. 1971), *cert. denied,* 404 U. S. 491 (1971). The defendant's reliance on *Geduldig* v. *Aiello,* 417 U. S. 484 (1974) and *Willingham* v. *Macon Co. Telegraph,* 507 F. 2d 1084 (5th Cir. 1975), is misplaced.

Although plaintiffs have established a violation of § 703(a), the question still remains whether summary judgment can be granted on the issue of defendant's liability. The defendant asserts that, through its affidavits and various exhibits, it has

raised a factual issue as to whether or not defendant's no pregnancy/no motherhood policy is excluded from § 703(a) by virtue of the bona fide occupational qualification exemption under § 703(e). That section provides that:

"... [I]t shall not be an unlawful employment practice for an employer to hire and employ employees ... in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business ..." 42 U. S. C. § 2000e-2(e).

In *Sprogis* v. *United Air Lines, Inc., supra,* the Seventh Circuit found that a bona fide occupational qualification is established under § 703(e):

"... if and only if, that requirement reflects an inherent quality reasonably necessary to satisfactory performance of the duties of stewardesses. By its very terms, the narrow exception in § 703(e)(1) calls for employers to treat their employees as individuals." 444 F.2d at 1199.

Thus the Court finds that a business necessity rather than a business convenience test must be applied in establishing a bona fide occupational qualification. The depositions of defendant's officers make it clear that there is no rational justification for American's no motherhood policy. These depositions reveal that female parents have been operating as safe flight personnel since American abdicated its no motherhood policy in 1970; that the health status of flight crew members can only be established on an individual basis, rather than a class basis; and that, since the abdication of the policy, female parents have not caused American operating problems.

In an attempt to counteract the admissions of its officers, defendant seeks to raise factual issues with regard to its qualification for a § 703(e) exemption. The Court has examined defendant's affidavits and various exhibits, but has found them insufficient to establish a genuine issue of material fact. The Alford affidavit is based largely on belief rather than

personal knowledge and fails to set forth sufficient facts to raise a material issue. The Lederer affidavit refers primarily to the dangers of pregnant women continuing to work as stewardesses. This issue is not before the Court. The remaining affidavits do not provide sufficient facts to establish a genuine issue as to whether or not defendant's policy might qualify for a bona fide occupational qualification exemption.

Thus the Court finds that defendant American has failed to establish a genuine issue of material fact concerning whether or not its no motherhood policy is necessary for the operation of its business. Therefore, the Court finds that defendant did not qualify for the § 703(e) exemption, and thus defendant's no pregnancy/no motherhood policy was violative of § 703(a) of the Civil Rights Act. Plaintiffs' motion for summary judgment is granted on the issue of liability only. A decision on plaintiffs' further request for appointment of a master to facilitate a fashioning of remedies is deferred until the questions concerning the scope and membership of the plaintiffs' class are resolved.

Enter:

/s/ Frank J. McGarr
United States District Judge

Dated: April 28, 1976

Rec. No. 93

* * (Caption—No. 70 C 2071) * *

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed July 9, 1976)

Now come the plaintiffs, by their attorneys, and move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for entry of summary judgment in favor of plaintiffs, finding that the defendant's policy violates Title VII of the Civil Rights Act of 1964 (42 U. S. C. 2000(e) et seq.).

In support of this motion, plaintiffs state that there is no genuine issue as to any material fact and that plaintiffs are entitled, as a matter of law, to the relief requested.

Charles Pressman,
One of the Attorneys for Plaintiffs

Rec. No. 99

* * (Caption—Nos. 70 C 2069, 70 C 2071) * *

MEMORANDUM OPINION AND ORDER

(Entered October 19, 1976)

On November 18, 1974, The Honorable Richard J. McLaren issued a memorandum opinion and order allowing defendants Trans World Airlines, Inc. and American Airlines, Inc. to amend their answers to include the "affirmative defense" of the statute of limitations contained in 42 U. S. C. § 2000e-5e. This statute imposed a ninety-day period after an alleged unlawful practice within which a charge could be filed with the Equal Employment Opportunity Commission. Judge McLaren noted and left open the question of whether defendants' delay in pleading the defense of limitations constituted a waiver of the defense.

Defendants are now moving to exclude certain persons of plaintiffs' class for lack of subject matter jurisdiction, urging that Title VII's time limits are not a matter of defense but are,

rather, jurisdictional prerequisites not subject to waiver by the actions of the defendants. Factually, they are seeking to exclude all persons whose employment was terminated on the grounds of pregnancy more than ninety days prior to May 31, 1970, the date of filing by the original plaintiff-union, Air Line Stewards and Stewardesses Association, Local 550.

Several courts have recently considered the question of whether Title VII's time limits are in the nature of statutes of limitations or jurisdictional prerequisites, and have concluded the former. *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924 (5th Cir. 1975); *Dartt* v. *Shell Oil Co.*, ____ F. 2d ____, 13 FEP Cases 12 (10th Cir. 7/22/76); 408 F. Supp. 229 (D. Conn. 1976).

The Seventh Circuit, however, has characterized the issue as jurisdictional. *Choate* v. *Caterpillar Co.*, 402 F. 2d 357 (7th Cir. 1968); *see* also *Evans* v. *United Air Lines, Inc.*, 534 F. 2d 1247 (7th Cir. 1976); *McGuire* v. *Aluminum Company of America*, ____ F. 2d ____, No. 76-1013 (7th Cir. 9/9/76). This court is persuaded that the Seventh Circuit holding is correct and that the time requirements of Title VII are jurisdictional in nature.[1]

Having so decided, the next question for resolution is whether the claims of certain class members are time-barred. Defendants' motion is grounded upon the assumption that the violation occurred at the moment of termination due to pregnancy and, therefore, the ninety days began to run for each class member at that moment. Plaintiffs, on the other hand, assert the existence of a "continuing violation" which existed at least until the airlines abandoned their policy of refusing to rehire mothers.

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[1] Plaintiffs urge that this court should estop the defendants from raising the jurisdictional question. E.g., *DiFrischia* v. *New York Central Railroad*, 279 F. 2d 141 (3rd Cir. 1960). Because of the view we take of this case, we need not reach this extraordinary estoppel question.

We agree with the plaintiffs' view of this action. If this case sought only to challenge the policy of firing pregnant stewardesses, we would agree that the ninety-day limit began to run the moment of termination. But, as noted in our memorandum opinion and order dated April 28, 1976, this case challenges a policy much more broad than that. It challenges the "no motherhood" policy which begins at pregnancy, yet continues to prevent the re-hiring of the alleged class members once pregnancy is at an end. Thus, we find a continuing violation of plaintiffs' rights which existed until the time that defendants changed the challenged policy.[2] *See, Boudreaux* v. *Baton Rouge Marine Contracting Co.,* 437 F. 2d 1011 (5th Cir. 1971); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F. 2d 979 (D. C. Cir. 1973). Because of the essential difference between the parties as to the nature of the violation here, and the court's agreement with the plaintiffs' position, defendants' authorities do not compel a different result.[3]

For the foregoing reasons, defendants' motion to exclude certain persons from the class for lack of subject matter jurisdiction is hereby denied.

/s/ Frank J. McGarr
United States District Judge

Dated: October 15, 1976

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[2] We note further, although we do not base our holding today thereon, plaintiffs' allegations that the effects of the discriminatory policy continued past that date as to all stewardesses who are not rehired pending the outcome of this case because they failed to waive their claims to back-pay. The allegation with respect to back-pay appears to be within the scope of *Evans* v. *United Airlines, Inc., supra.* Perpetuation of a disadvantage suffered because of a past discrimination is itself a violation thereunder.

[3] We have considered, too, the Memorandum of Movants for Intervention in Reply to Plaintiffs' Memorandum in Response to Defendants' Motion to Exclude Certain Persons From the Class. The memorandum is directed basically towards a final remedy in this case and against various allegations made by plaintiffs with respect to this predecessor union's good faith. That memorandum does not call for a different result within the context of this motion.

Rec. No. 99

* * (Caption—70 C 2071) * *

MEMORANDUM OPINION AND ORDER

(Entered October 19, 1976)

Plaintiffs have moved for summary judgment pursuant to Rule 56, Fed. R. Civ. P. on the issue of liability of defendant Trans World Airlines (TWA), for violation of Title VII of the Civil Rights Act (42 U. S. C. § 2000e, et seq.) The complaint alleges that prior to 1970, women employed by defendant TWA as flight attendants were forced to resign or were discharged when they became pregnant, and were refused opportunity to continue in their positions as stewardesses at any time following their pregnancies. This policy and practice of TWA, the complaint alleges, did not apply to male flight personnel employed by the defendant.

On April 28, 1976, this court granted summary judgment for the plaintiffs in the related case against American Airlines (No. 70 C 2069). Plaintiffs' motion for summary judgment herein is based on this court's ruling in the *American* case. Plaintiffs allege that the facts and circumstances are the same in this action as in that against American, and that, therefore, the court's ruling in that case and the authority cited therein should be controlling in this action. Defendants, on the other hand, claim that the circumstances are not the same and have filed affidavits and abstracts of the depositions of various TWA personnel alleging that there are factual issues which would preclude the court's granting of summary judgment for the plaintiffs.

The court has reviewed the memoranda filed by both parties and the exhibits filed by the defendant. The court agrees with the plaintiffs that the issues in this case are controlled by the court's previous opinion and the authority cited therein. In

accordance with the previous opinion and order, the court finds defendant TWA's "no motherhood" policy violative of § 703(a) of the Civil Rights Act, 42 U. S. C. § 2000e-2(a). Furthermore, the court finds that defendant's exhibits, based largely on opinion and hearsay rather than fact, fail to raise a genuine issue of material fact concerning defendant's claim for a bona fide occupational qualification under § 703(e) of the Civil Rights Act, 42 U. S. C. § 2000e-2(e).

For the foregoing reasons, plaintiffs' motion for summary judgment on the issue of TWA's liability for violation of Title VII of the Civil Rights Act is granted.

Enter:

/s/ Frank J. McGarr
United States District Judge

Dated: October 18, 1976

Rec. No. 106

* * (Caption—No. 70 C 2071) * *

ORDER

(Entered December 16, 1976)

Enter amendment to order that the orders entered on October 18, 1976 granting summary judgment against Trans World Airlines, Inc. and on October 15, 1976 denying Trans World Airline's motion to exclude are amended by adding the following to each order: This court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 24, 1978

Before

Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Wilbur F. Pell, Jr., *Circuit Judge*
Hon. Robert A. Sprecher, *Circuit Judge**

In Re:
CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES,

No. 77-1325

Appeal of:
AMERICAN AIRLINES, INC., and TRANS WORLD AIRLINES, INC.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

Nos. 70-C-2069, 74-C-2063
70-C-2071, 74-C-2762
72-C-498

Frank J. McGarr, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the district court properly granted summary judgment in favor of the plaintiffs; and the order of October 15, 1976 is VACATED and REMANDED, in accordance with the opinion of this court filed this date. Each party shall bear its respective costs.

* Although Judge Sprecher heard oral argument, he later disqualified himself from any participation in the decision, and preparation of the opinion, in this case.

Office-Supreme Court, U.S.
FILED
JUL 11 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 78-1545 and 80-951 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANNE B. ZIPES, *et al.*,
Petitioners,
v.
No. 78-1545

TRANS WORLD AIRLINES, INC.,
Respondent.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,
v.
No. 80-951

TRANS WORLD AIRLINES, INC. and ANNE B. ZIPES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX
VOLUME II

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PETITION FOR CERTIORARI IN NO. 78-1545 FILED APRIL 10, 1979
AND IN NO. 80-951 ON DECEMBER 12, 1980
CERTIORARI GRANTED MARCH 9, 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 78-1545, 80-951 (Consolidated)

ANNE B. ZIPES, *et al.*,
Petitioners,
v. *No. 78-1545*

TRANS WORLD AIRLINES, INC.,
Respondent.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,
v. *No. 80-951*

TRANS WORLD AIRLINES, INC. and ANNE B. ZIPES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES *

August 24, 1978—Opinion of the Court of Appeals for the Seventh Circuit in *In re: Consolidated Pretrial Proceedings in the Airline Cases.*

June 27, 1979—Plaintiffs' notice to class members and proposed settlement agreement filed in United States District Court for the Northern District of Illinois, Eastern Division.

June 29, 1979—Order entered designating two sub-classes, preliminarily approving the proposed settlement agreement, directing that notice be distributed to all known class members and setting hearing on approval of the settlement agreement pursuant to Rule 23(e), F.R.Civ.P. for July 31, 1979.

July 25, 1979—Motion and petition to intervene by the Independent Federation of Flight Attendants.

July 31, 1979—Hearing on proposed settlement agreement.

August 2, 1979—Order dated July 31, 1979 entered sustaining Union's motion to intervene and motion to suspend final approval of proposed settlement agreement.

August 23, 1979—Plaintiffs' motion for leave to amend proposed settlement agreement filed.

August 23, 1979—Order entered sustaining plaintiffs' motion for leave to amend proposed settlement agreement. Amendment to proposed settlement agreement filed.

September 24, 1979—Order dated September 14, 1979 overruling intervenor's objection to court's jurisdiction to approve proposed settlement agreement entered.

October 3, 1979—Hearing on approval of proposed settlement agreement and grant of retroactive competitive seniority.

November 13, 1979—Orders dated November 8, 1979 entered approving settlement agreement, awarding seniority and dismissing actions.

December 4, 1979—Intervenor's notice of appeal filed.

June 13, 1980—Opinion and judgment of the Court of Appeals for the Seventh Circuit.

September 17, 1980—Order of the Court of Appeals for the Seventh Circuit denying petition for rehearing.

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* All relevant docket entries are listed in Volume I of the Joint Appendix. Restated herein below are those docket entries relating specifically to the time period reflected by the documents contained in this Volume II.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, PAMELA DAILING, SADIE SUE LAKE, PAT SANTINI, VIRGINIA HIRT and BONNIE YODER, *Plaintiffs,*

v.

TRANS WORLD AIRLINES, INC., *Defendant.*

No. 74 C 2063

ANNE B. ZIPES, FRANCES M. SWIFT, *et al.*, *Plaintiffs,*

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC., *Defendants.*

ORDER

This Court has previously been advised of settlement negotiations between the parties and has heard the joint suggestions of the parties to designate, pursuant to Rule 23(c)(4), two sub-classes, at least in connection with a proposed settlement. The Court hereby designates the following two sub-classes, comprised of the following persons:

SUB-CLASS A

All former TWA hostesses whose employments as hostesses were terminated on or after July 2, 1965 (by resignation or otherwise) on account of pregnancy or adoption (1) and which pregnancy ended or the adoption occurred on or after March 2, 1970 or (2) which pregnancy ended or the adoption occurred prior to March 2, 1970 but who were thereafter reinstated in ground duty positions and who continued such ground employment continuously until March 2, 1970.

SUB-CLASS B

All former TWA hostesses whose employments as TWA hostesses were terminated on or after July 2, 1965 on account of pregnancy or adoption but who are not members of Sub-Class A.

The Court appoints Kevin Forde, Esq., 111 West Washington Street, Chicago, Illinois, as counsel for Sub-Class A. Charles Pressman and Aram A. Hartunian, of the firm of Pressman & Hartunian, 55 East Monroe Street, Chicago, Illinois and Arnold I. Shure, Esq., 10 South LaSalle Street, Chicago, Illinois shall continue to act as counsel for Sub-Class B.

The Court having been formally apprised by the parties that an agreement has been reached to settle the above-captioned cases and the proposed Settlement Agreement having been presented to the Court, the Court finds, preliminarily, that the Settlement Agreement is reasonable, fair and adequate so as to qualify said settlement for submission to the class members and further consideration by this Court.

It is further ordered that a notice substantially in the form attached hereto be distributed to all known class members. The Court having been advised by the parties that the list of class members which is attached to the

Settlement Agreement includes all class members who have come to the attention of the parties, by discovery or otherwise, after nine (9) years of litigation during which diligent efforts were made to identify and locate all class members, it is ordered that the notice be distributed to the persons named in the aforesaid list.

It is further ordered that the notice be distributed by first class mail, postage prepaid, and deposited in the mails by no later than June 29, 1979.

A hearing to determine whether or not the Settlement Agreement should be approved pursuant to Rule 23(e), F.R.P.C. shall commence on the 31st day of July 1979, at the hour of 10:30 A.M. If the Settlement Agreement is approved, and if any party or person then objects to the provisions of the Settlement Agreement regarding retroactive seniority for hostesses re-employed thereunder, the Court, pursuant to Section 706(g) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(g), will thereupon conduct a hearing thereon. For this purpose, it is hereby ordered that the Independent Federation of Flight Attendants be furnished with a copy of this Order together with a copy of the proposed Settlement Agreement (by certified mail, return receipt requested) as notice thereof.

ENTER:

/s/ [Illegible]
United States District Judge

DATED: June 27, 1979

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

NOTICE TO CLASS MEMBERS

Pursuant to an Order of the Court, this Notice is being distributed to all persons who have previously been included as class members in these cases.

The purpose of this Notice is to advise you: (1) of the provisions of a settlement agreement, (2) of your rights under the settlement agreement, and (3) of a court hearing on the agreement to be held on July 31, 1979, at 10:30 A.M.

HISTORY OF THE LITIGATION

On July 2, 1965, the Civil Rights Act of 1964 (the "Act") went into effect, prohibiting employment discrimination on the basis of sex. On August 18, 1970, a suit was filed alleging that Trans World Airlines, Inc. ("TWA") had violated the Act. The suit was brought on behalf of all hostesses who were fired (or resigned) on account of pregnancy or the adoption of a child. In 1971, a settlement agreement was entered into which was approved by the District Court but that approval was reversed on appeal to the Seventh Circuit Court of Appeals. The Court of Appeals also ordered that the union (Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO) be removed as the representative of the class. *ALSSA* v. *American Airlines, Inc.*, 490 F.2d 636, (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). When the case resumed in the District Court, Pamela Dailing, Pat Santini and Ann B. Zipes were appointed as the representatives of the class.

In 1972, TWA offered re-employment as hostesses, without retroactive seniority or back pay, to those class

members who agreed to waive their rights in this litigation. In 1974, another suit was filed which alleged that TWA's 1972 offer was a violation of the Act.

On October 15, 1976 and October 18, 1976, respectively, two Court Orders were entered which: (a) declared that TWA's aforesaid employment practice had been a violation of the Act and (b) ruled that the class included all hostesses who had been fired after July 2, 1965 on account of motherhood.

TWA appealed to the Seventh Circuit Court of Appeals. In August 1978, the Court of Appeals ruled that the aforesaid employment practice was a violation of the Act but that the only persons who are entitled to membership in the class are those hostesses who either (a) gave birth to children on or after March 2, 1970 or (b) gave birth to children prior to March 2, 1970 and thereafter held ground jobs continuously until March 2, 1970. (582 F.2d 1142). That decision of the Court of Appeals was appealed to the United States Supreme Court by the plaintiffs and TWA by petitions for writs of certiorari. Prior to any decision by the U.S. Supreme Court, this settlement agreement was entered into. The agreement has been signed by TWA, Pamela Dailing, Pat Santini and Anne B. Zipes. It was presented to the District Court on June 26, 1979 at which time it was preliminarily approved by the Court. For purposes of this proposed settlement, the Court divided the class into two sub-classes, *viz.*:

SUB-CLASS A

> All former TWA hostesses whose employments were terminated on account of pregnancy or adoption and whose pregnancies ended (or the adoption occurred) on or after March 2, 1970 or whose pregnancies ended (or the adoption occurred) prior to March 2, 1970 but who were employed thereafter in ground jobs continuously until March 2, 1970;

SUB-CLASS B

All former TWA hostesses whose employments were terminated on account of pregnancy or adoption and whose pregnancies ended (or the adoption occurred) prior to March 2, 1970 but who were not thereafter employed in ground jobs continuously until March 2, 1970.

Separate attorneys have been appointed to represent the interests of the aforesaid two sub-classes. The attorney for Sub-Class A is Kevin M. Forde, 111 W. Washington Street, Chicago, Illinois, who was appointed by the Court in June 1979 to provide separate representation for Sub-Class A, including the evaluation of the fairness of the settlement to Sub-Class A. The attorneys for Sub-Class B are Arnold I. Shure, 10 South LaSalle Street, Chicago, Illinois and Pressman & Hartunian, Chtd., 55 East Monroe Street, Chicago, Illinois. Prior to the appointment of Mr. Forde, Mr. Shure and his associates and Pressman & Hartunian represented all of the class members. DO NOT MAKE INQUIRIES BY TELEPHONE TO THE AFORESAID ATTORNEYS OR TO THE COURT; YOU MAY DO SO ONLY IN WRITING.

A hearing will take place on July 31, 1979 at the hour of 10:30 A.M. at the U.S. District Courthouse, 219 South Dearborn Street, Chicago, Illinois in the courtroom of Judge Stanley J. Roszkowski, to determine whether or not the settlement agreement should be finally approved.

THE SETTLEMENT AGREEMENT

The Settlement Agreement is available for inspection by any interested person. It is on file at the office of the Clerk of the U.S. District Court, 219 South Dearborn Street, Chicago, Illinois. The provisions of the settlement agreement are summarized as follows:

RE-EMPLOYMENT OR TRIP PASSES

All members of both sub-classes will be entitled to reemployment as TWA hostesses or, if you so desire, you

may receive twelve (12) trip passes instead, the details of which are stated below.

In order to be eligible for re-employment as a hostess, the following requirements must be met by you:

(1) Complete the enclosed Claim Form;

(2) Successfully pass TWA's medical examination;

(3) Successfully meet TWA's physical requirements;

(4) Complete TWA's re-training course.

If you apply for re-employment, you will be notified by TWA of the date and place of the re-training class to which you will be assigned. The re-training classes will be conducted at various times within one year following final approval of the settlement. Base assignments will be made according to seniority. If no vacancy exists at a base of your choice, TWA will assign a base to you.

SENIORITY

Each re-employed class member will be credited with the seniority which accrued as of the time when she was terminated plus retroactive seniority (to the extent allowed by the Court) for such of the time subsequent to termination as the Court allows. The plaintiffs intend to seek full retroactive seniority for the entire period up to June 18, 1979.

Any class member who does not become re-employed as a hostess will receive twelve (12) trip passes, each of which shall be at any time during her lifetime good for a TWA round trip by her, her spouse, or any of her dependent children under 21 and her children under 23 who are full-time students. The passes will be Class 9 (which is the priority for retired hostesses) except that other persons holding Class 9 passes shall have priority.

BACKPAY

TWA will pay $1,500,000 to Sub-Class A (the post-March 1970 group), to be prorated amongst them on the basis of their respective losses of net earnings since termination. There are approximately 30 persons in this sub-class.

TWA will pay an additional $1,500,000 to sub-class B (the pre-March 1970 group) to be prorated amongst them on the basis of their respective losses of net earnings since termination. There are approximately 400 persons in this sub-class.

The prorations will be based on losses and earnings after adjustment for periods of disability and actual earnings since termination. Deductions will be made for Social Security, income tax withholding, and plaintiffs' attorneys' fees and expenses.

Attorneys' fees and expenses will not be determined unless and until the agreement is first approved. The plaintiffs' attorneys intend to seek an award of fees, from the total settlement funds of $3,000,000, in the total amount of up to $1,250,000 plus expenses, to be divided equally between the two Sub-Classes. Their petitions for attorneys' fees will set forth their efforts during seven years of litigation, consisting of in excess of 4,000 hours of lawyer time expended on behalf of all class members. Mr. Forde will file a separate petition for services rendered to Sub-Class A subsequent to June 20, 1979. If the settlement is approved, the Court will make its decision on fees based upon fairness and the applicable standards of law.

The re-employment rights and trip-pass benefits are the same for both sub-classes. The individual members of Sub-Class A will receive much larger amounts than the individual members of Sub-Class B. The decision of the Plaintiffs' attorneys to accept the offer which gives rise to this disparity was due to the Court of Appeals'

opinion, which held that the members of Sub-Class A are entitled to relief but that the claims of the members of Sub-Class B are barred on account of no one of them having filed a timely claim with the federal Equal Employment Opportunity Commission.

OBJECTIONS AND COMMENTS

If the settlement is finally approved, both lawsuits will be dismissed. You may appear and be heard, in person or by an attorney, at the hearing on July 31, 1979. You may also file in writing a statement of your objections or comments. This may be done by mail, addressed to:

Clerk of the U.S. District Court
Re: Consolidated Airlines Stewardess
Litigation, Case No. 70 C 2071
219 South Dearborn Street
Chicago, Illinois 60604

The objection or comment must arrive at the Clerk's office by no later than July 27, 1979.

RETURN OF CLAIM FORMS

IN ORDER TO RECEIVE ANY OF THE BENEFITS OF THE SETTLEMENT, REGARDLESS OF WHETHER OR NOT YOU OBJECT OR HAVE ANY COMMENT, YOU MUST RETURN THE ENCLOSED CLAIM FORM, SIGNED BY YOU AND NOTARIZED, MAILED OR DELIVERED TO:

PRESSMAN & HARTUNIAN, CHTD.
55 East Monroe Street
Suite 4005
Chicago, Illinois 60603

The claim forms must be received by Pressman & Hartunian, Chtd. by no later than August 31, 1979.

Clerk of the U.S. District Court
for the Northern District of
Illinois, Eastern Division

UNION'S PETITION FOR INTERVENTION
[Filed July 25, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

PETITION FOR INTERVENTION

Comes now the Intervenor, the Independent Federation of Flight Attendants, and today files this Petition for Intervention. In support of its Petition, Intervenor states:

1. Independent Federation of Flight Attendants (IFFA) is an unincorporated association with its principal address at 630 Third Avenue, New York, New York, and is a labor organization, national in scope, representing for purposes of collective bargaining flight attendants employed by air carriers under the provisions of the Railway Labor Act, Title 45 U.S.C. Sec. 151, *et seq.* On April 1, 1977, IFFA was certified by the National Mediation Board as the duly designated and authorized representative of all flight attendants employed by Trans World Airlines, Inc. (TWA), and ever since that date has been the exclusive bargaining representative of all flight attendants employed by TWA for all matters pertaining to wages, hours, and working conditions, including the seniority and seniority rights of such flight attendants arising solely by virtue of the Collective Bargaining Agreement in effect between IFFA and TWA.

2. Intervenor represents the flight attendants currently employed by the defendant.

3. Representatives of the plaintiff class and defendant have reached a tentative settlement of these actions.

4. If the proposed settlement is put into effect, approximately 430 individuals will be offered reinstatement to positions within the bargaining unit represented by Intervenor.

5. As part of the settlement plaintiffs seek both retained and accrued seniority.

6. The United States Court of Appeals for the Seventh Circuit has ruled in this case that approximately 400 of the 430 defendants are entitled to no relief on their claims against defendant; however, defendant has nonethless agreed to settle this case by offering reinstatement to all class members, including these 400 individuals.

7. The job seniority of a flight attendant is a valuable property right, which greatly affects the rights, privileges, and general working conditions of the flight attendant.

8. If all plaintiffs are reinstated with full seniority, the rights of many of Intervenor's members will be impaired.

9. Neither plaintiffs nor defendant sought Intervenor's consent or input in conducting settlement negotiations.

10. No party has attempted to join Intervenor as an additional party to this action pursuant to Rule 19 of the Federal Rules of Civil Procedure, despite the fact that in the absence of Intervenor, complete relief cannot be accorded; and that defendant may be subjecting itself to inconsistent or multiple obligations.

11. The proposed settlement is not valid and cannot be put into effect without the consent of the Intervenor.

12. Approval by the court of a settlement agreement between plaintiffs and defendants which reinstates all plaintiffs with full seniority, without the consent of Intervenor and its members, and without right of trial, violates the rights of Intervenor and its members to due process of law.

13. It would not be just and proper for the court to approve a settlement reinstating all plaintiffs with full seniority.

14. The proposed settlement allows defendant to settle these actions, but unfairly and improperly forces Intervenor and its members to bear the burden of this settlement.

15. The proposed settlement agreement raises many unanswered questions which directly affect the rights of Intervenor and its members.

16. The proposed settlement agreement between plaintiff class and defendant TWA improperly restricts and diminishes legitimate seniority rights and expectations of TWA's male and female incumbent flight attendants who are not members of the proposed class in violation of Sections 703(h) and 703(j) of the Civil Rights Act of 1964.

17. The proposed settlement agreement between defendant TWA and plaintiff class, to the exclusion of and without approval of Intervenor, is prohibited by and in violation of the Railway Labor Act, Title 45 U.S.C. Sec. 152, Sixth and Seventh and Sec. 156, all made applicable to carriers by air, Sec. 181.

18. The court lacks jurisdiction to make any orders in regard to the claims of those members of the plaintiff class whose claims have been held jurisdictionally insufficient by the Seventh Circuit Court of Appeals.

WHEREFORE, Intervenor prays that: the proposed settlement not be approved insofar as it provides for reinstatement with competitive or occupational or union seniority; the court direct that Intervenor be included in any further settlement negotiations insofar as any proposed settlement may infringe upon the rights of Intervenor and its members; the court rule that it has no

jurisdiction to make any orders regarding the claims of those class members whose claims have been found to be jurisdictionally deficient by the Seventh Circuit Court of Appeals; and, if despite the above the court approves the proposed settlement agreement, the court order that plaintiffs be reinstated without occupational, competitive or union seniority.

Respectfully submitted,

COGHLAN, JOYCE & NELLIS
One North LaSalle Street
Suite 4000
Chicago, Illinois 60602
Tel: 312-346-7174

By /s/ James L. Coghlan
JAMES L. COGHLAN

/s/ Thomas J. Reed
JAMES J. REED
JOLLEY, MORAN, WALSH, HAGER & GORDON
1300 Traders Bank Building
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Kansas City, Missouri 64106
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By /s/ William A. Jolley
WILLIAM A. JOLLEY

/s/ Scott A. Raisher
SCOTT A. RAISHER

/s/ Steven A. Fehr
STEVEN A. FEHR

Attorneys for Intervenor IFFA

EXCERPT OF PROCEEDINGS ON JULY 31, 1979

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted in printing]

EXCERPT of PROCEEDINGS had at the hearing of the above-entitled cause before the HONORABLE STANLEY J. ROSZKOWSKI, one of the judges of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, July 31, 1979, at the hour of 10:30 o'clock a.m.

PRESENT:

MR. KEVIN M. FORDE

MR. ARAM HARTUNIAN
MR. ARNOLD I. SHURE

MR. LAWRENCE A. CARTON

MR. WILLIAM A. JOLLEY
MR. STEVEN A. FEHR

Also present: Ms. Elizabeth Harris
Ms. Anne B. Zipes

[31] • • • •

MR. JOLLEY: Your Honor, William A. Jolley, attorney for the intervenor, Independent Federation of Flight Attendants, and I am here to speak on behalf of that organization, which is the current collective bargaining representative of 7000 present on-line TWA flight attendants, to oppose the approval of the settlement agreement as it is written.

As your Honor knows, we requested additional time to present these matters to the court by way of brief, because of the complexity and the novelty and the seriousness of the matters we think are present in this case. I would like at this point to state our objections, and of course leave it up to the court whether we have additional time to brief.

Your Honor, to begin with, I think something has to be clarified. As I sit and listen to Mr. Hartunian, it appears to me he does not fully comprehend the scope and the breadth of the union's objection. It appears to me that Mr. Hartunian is supposing or presupposing that the union is only objecting to what the settlement agreement refers to as retroactive seniority that would have accrued to returning class members between the time of termination of resignation and the date of reinstatement.

If that is any party's or the court's understanding that that is our objection or the limit of our objection, [32] that is incorrect. We object, your Honor, to the settlement agreement insofar as it provides for any restoration of competitive or union or job seniority.

Now, these terms are interchanged in court decisions, but basically there is a distinction between job or union seniority on the one time, and company seniority on the other. Job or union seniority is that seniority that a flight attendant in this case uses to gain benefits at the expense of some other member of the bargaining unit, such as job bidding, such as bidding for lines of time, and many other provisions of the contract.

In addition, there is company seniority. Company seniority will determine—and is noncompetitive—company would determine pay scale progression: how many years a person has in the employ of the company will determine their slot on the pay scale, how much money he or she will get for performing that job. We don't care about that. That is not at the expense of another flight attendant.

Pass allotments: After 15 years an employee gets a term pass. We don't care about that because that is not union seniority, that is not competitive seniority.

Sick leave accrual: The amount of sick leave days a person has in his or her individual sick leave bank is a matter of company seniority and not union seniority. We don't object to that.

[33] The amount of vacation days an employee will earn is based upon time with the company and that is not a matter of concern to the union, so we don't object to it here.

Retirement benefits based upon years of service does not come at the expense of another flight attendant, so we don't object to that. But for union or competitive seniority, your Honor, we object to the approval of this settlement insofar as that settlement includes any retroactive union or job or competitive seniority, and I use those terms interchangeably.

It is our position that TWA and the plaintiffs can only agree upon what they have control over. In this case we have TWA agreeing to settle this case. In addition to paying money out of TWA's pocket, they are offering what is not theirs. They are offering seniority that is administered by the union, is a creature of the union collective bargaining agreement, and which in fact belongs to the on-line flight attendants, many of whom are in this courtroom today.

The company can give money, the company can give passes, the company can give jobs to members of the class, and the company can give company seniority and we don't have anything to object to on that basis. We have no standing to object because those benefits do not exist as a [34] creature of our collectively bargained negotiated signed agreement, which has been approved by the on-line flight attendants who presently work for TWA, but it is our position, your Honor, that the court cannot approve this agreement A, as a settlement, be-

cause it includes matters that require the union's consent and the union is not a party to this settlement and does not settle, nor can your Honor approve this settlement as a consent decree because there has been no acknowledgement or establishment of liability which would allow the court over the objections of the union to reinstate seniority which belongs to present flight attendants, and which is a creature of the current collective bargaining agreement.

The only way, your Honor—and there is no case to the contrary—in feverish research I will represent to the court there is no situation analogous to the present fact situation in front of the court here. The two ways that seniority can be adjusted to remedy a past violation of the Civil Rights Act, one is where the union agrees and negotiates a settlement to adjust present seniority by restoring previously discriminated-against employees their rightful seniority place. That is where the union is a party to the agreement and that is what happened in the Weber case recently decided by the Supreme Court.

* * * *

[41] Your Honor, the likelihood of success in this case is dependent upon the Supreme Court granting cert, hear-likelihood of success by the 400 members of Subclass B is dependent upon the Supreme Court granting cert, hearing the case, and reversing the 7th circuit. That is the likelihood of success upon which the plaintiff class members in Subclass B are relying.

In approving settlement I think the court has to look at judicial economy and the possible saving of time. Your Honor, all that needs to be determined to put this case at rest once and for all—to answer the objections that we are making or any of the other matters in this case—is let the parties continue to wend their way to the Supreme Court where their position for cert has been held in abeyance, and let the Supreme Court rule on the

7th circuit's opinion, because if it doesn't grant cert, or if it upholds the 7th circuit, then obviously the 400 members of Subclass B are entitled to nothing.

* * * *

[48] TWA is not paying the price to members of Subclass B, and in fact there is a totally disproportionate price tag on this settlement that is being paid by the membership of the Independent Federation of Flight Attendants—the present on-light flight attendants.

Your Honor, we don't say that Subclass B should get nothing, we are saying that they should not get what is not—they should not get what the company can't give.

The settlement agreement as to Subclass B provides that they get jobs back without union or job seniority, that if they got full company seniority for purposes of pay, the amount of retirement, amount of vacation, amount of sick days—we would have no objection to that. We object to the settlement agreement insofar as it gives any retroactive union or job or competitive seniority, and your Honor, we would like to brief the matters that we have raised. We think they are serious, we think they are complex. We think that they exist on a rapidly changing developing area of law. We would ask some time to brief these questions with your Honor delaying or holding up your approval of this settlement until such time as we have had the opportunity to submit briefs. And we do [49] want to be heard, your Honor, on the adverse impact on the seniority adjustments from an evidence standpoint, once you do approve—as the order indicates—once you approve the settlement agreement you then intend to have a hearing on seniority—we do wish to be heard at that time also.

* * * *

[101] I agree with one thing that Mr. Hartunian said, that you don't have to decide whether you have jurisdic-

tion, and the reason that you don't have to decide is that the Seventh Circuit has already decided it for you.

THE COURT: Counsel, are you saying that because they have not made a decision which is obviously subject to an appeal to the Supreme Court at this point, that the parties to the litigation do not have a right at this point in time to settle the litigation?

MR. FEHR: No, your Honor, I am not saying that. May be we should talk about the difference between settlement and consent decree.

THE COURT: I think you are saying that.

MR. FEHR: No, a settlement in the normal concept involves only two people, and they settle it between themselves. Obviously if you are settling something and you try to settle the rights of the third party without that third party being present, there is some question as to whether that settlement is binding and valid upon that third party. Moreover, it is different when in addition to the part of the settlement which can be finally concluded, giving the benefits, giving the money, whatever—the parties also ask the Court to issue an order putting a settlement into effect and to enforce that settlement over the rights and objections of third parties who are [102] injured by the settlement. We are saying it doesn't give money. They don't have to come back to Court for that later, because it is all over. There is not anything more to be done. But insofar as it asks the Court to issue orders which deprive other individuals of something, I think it is a necessary prerequisite that the Court have subject matter jurisdiction over the case.

THE COURT: I understand your position.

MR. FEHR: I don't think Mr. Hartunian has distinguished the McArthur case one wit. I might add that to the extent that he made any hearsay comments as to what some attorneys said that are not here today and they reflect facts not in the opinion, we would object to it unless they present it in better form. But there were

other people appealing in the McArthur case other than the intervening innocent incumbent flight attendants. There were also some dissident class members. It is true, it is unclear whether anyone asks the Fifth Circuit to reconsider and dismiss the case and void the consent decree because of the jurisdictional question. That is just the point, your Honor. The Fifth Circuit knew and realized where there was no subject matter jurisdiction, the Court had no power to issue a consent decree and enforce that consent decree over the objection of the interested party.

EXCERPT FROM UNION-INTERVENOR'S MEMORANDUM BRIEF

[Filed August 14, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

UNION-INTERVENOR'S MEMORANDUM BRIEF CONCERNING THIS COURT'S LACK OF JURISDICTION AND AUTHORITY TO APPROVE THE PROPOSED SETTLEMENT AGREEMENT

I. *Union (Competitive) Seniority: The Union's Interest In This Settlement; The Settlement Provisions To Which The Union Objects; And The Reasons Behind These Objections.*

At the outset, and prior to this submission of legal arguments concerning this Court's lack of jurisdiction or authority to approve the settlement, a distinction should be made between those portions of the settlement to which the Intervenor does *not* object and those to which the Intervenor's objections *are* directed; in addition, the Union-Intervenor wishes to explain to the Court the compelling considerations—from the standpoint of both statutory mandate and the interests of those incumbent flight attendants currently represented by the Intervenor—behind these objections.

The Settlement Agreement provides for payment by TWA, to the class, of three million dollars (Settlement Agreement, Page 4), an offer of reemployment (Settlement Agreement, Page 5), trip passes for class members not returning to employment (Settlement Agreement, Page 11), and "Company seniority and length of serv-

ice" to which each reemployed class member "was entitled at the date on which her employment was terminated plus Company seniority and such length of service for the entire compensation period . . ." (Settlement Agreement, Section V. A., Page 8). As to the preceding entitlements of class members, the Union-Intervenor concededly has no standing to object and, indeed, does not object. Presently-employed flight attendants, represented by the Union are not adversely affected by these provisions.

The Settlement Agreement further provides, however, that reemployed class members shall be "restored to full occupational (Union) seniority and credit for length of service to the same extent as is provided in Section V. A. above"...

• • • •

EXCERPTS FROM TWA'S REPLY TO UNION MEMORANDUM

[Filed August 24, 1979]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted in printing]

TRANS WORLD AIRLINES' REPLY TO UNION MEMORANDUM OPPOSING, AND SUBCLASS A MEMORANDUM SUPPORTING, SETTLEMENT

The union attacks the proposed settlement because the provision of occupational or union seniority for reinstated employees is claimed to affect adversely the current employees represented by the union. TWA is not involved in this dispute since the settlement agreement provides that such seniority will be determined by the court "without contest or objection by TWA" (Section VB). But the union's attack on the seniority provision questions the jurisdictional validity of the settlement agreement because of the Court of Appeals' holding that subject matter jurisdiction was lacking for the approximately 400 Subclass B members who, the Court of Appeals held, had failed to file EEOC charges in time.

* * * *

the settlement of a Title VII action cannot allow union seniority to reinstated employees because current employees would necessarily be adversely affected. The union's position is contrary to two Court of Appeals' decisions in this very litigation.

In *ALSSA v. American Airlines*, 490 F. 2d 636, 640 (7th Cir. 1973), *cert. den.*, 416 U.S. 993 (1974), the seniority issue was a crucial consideration in the court's

overturning of the 1971 settlements that involved TWA and American Airlines. In both cases the terminated class members were represented by ALSSA, the then union of current employees, and by the union's counsel. Noting that seniority has a "very important effect" on stewardesses' trip assignments and similar matters, the Court of Appeals said that the stewardesses reemployed pursuant to the settlement "would want seniority to accrue during the period they had been out of the job, but the greater the seniority awarded to them, the larger the number of currently employed stewardesses who would be put to disadvantage." Due to the union's conflicting obligations concerning seniority, the trial court's approval of the settlements was reversed. The Court of Appeals here recognized that the allowance of accrued union seniority in a settlement agreement was an entirely proper consideration despite the disadvantage to current employees.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, ETC., *et al.*,
Plaintiffs,
vs.
TRANS WORLD AIRLINES, INC.,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before

HON. STANLEY J. ROSZKOWSKI
JUDGE

October 3, 1979

* * * *

[47] THE COURT: Anything further?

MR. JOLLEY: Your Honor, we have two short witnesses, one short witness and one not so short witness.

THE COURT: How short?

MR. JOLLEY: How short is the short one?

THE COURT: Yes.

MR. JOLLEY: I hesitate to call him short. Five minutes, perhaps.

THE COURT: I hope you are not referring to his height.

Why don't we call him before lunch then.

MR. JOLLEY: Mr. Teolis.

THE COURT: Raise your right hand and be sworn, please.

TESTIMONY OF ARTHUR TEOLIS,

called as a witness herein by the intervenor union, having been first duly sworn, was examined and testified as follows:

THE COURT: State your name and spell it for the record, sir.

THE WITNESS: My name is Arthur Teolis, T-e-o-l-i-s.

[48] DIRECT EXAMINATION

BY MR. JOLLEY:

Q Mr. Teolis, do you have any present position with the Independent Federation of Flight Attendants?

A Yes, I do. I am the president.

Q How long have you been the president of that organization?

A Since April 1, 1977.

Q Have you been the only president of the Independent Federation of Flight Attendants since its inception?

A Yes.

Q Are you carried on the TWA seniority list?

A Yes, I am.

Q What classification?

A I was hired as a purser.

Q How long have you been employed by TWA?

A Since March of 1970.

Q Is your position as president of the Independent Federation of Flight Attendants a full-time position?

A Yes, it is.

Q Did you participate in the negotiations of the current collective bargaining agreement between the Independant Federation of Flight Attendants and TWA?

A I did.

Q In what capacity?

[49] A As the spokesman for the negotiating committee.

Q Were you the principal spokesman?

A Yes.

Q Before I go any further, how long has the Independent Federation of Flight Attendants been in existence?

A Since April 1, 1977.

Q Was that the date of its certification by the National Mediation Board as the collective bargaining representative of TWA's flight attendants?

A That's correct.

Q Does the Independent Federation of Flight Attendants represent any other employee groups other than TWA flight attendants?

A No, we do not.

Q Are you familiar with Article 10 of the collective bargaining agreement?

A Yes, I am.

Q Specifically with Article 10-F?

A Yes.

Q Do you need a contract to refer to that?

A No, I don't.

Q Has any representative of TWA at any time and specifically in connection with the settlement of this lawsuit proposed or discussed or negotiated any changes [50] with the Independent Federation of Flight Attendants in the seniority provision of the collective bargaining agreement?

A No, they haven't.

Q Specifically, has there been any request to change Article 10-F on page 82 of the collective bargaining agreement?

A No.

Q Were you or was any representative to your knowledge of IFFA invited to participate or did you partici-

pate in the settlement discussions that led to the proposed settlement in this lawsuit betwen the plaintiff class and Trans World Airlines?

A I did not.

Q Prior to your learning of that settlement, were you or any other representative of the Independent Federation of Flight Attendants given the opportunity by TWA or any other party to have an input or discuss the effects of seniority restoration upon the existing flight attendants under the existing collective bargaining agreement?

A No.

Q Are you familiar with the reaction of present incumbent flight attendants to the proposed restoration of seniority pursuant to this settlement agreement?

MR. HARTUNIAN: Objection, your Honor.

[51] THE COURT: I will allow that to stand, but I don't know how much farther you are going with it. Are you going into hearsay matters?

MR. JOLLEY: I am asking based upon his direct knowledge.

THE COURT: You would almost necessarily have to go into hearsay, wouldn't you?

MR. JOLLEY: Not if he has received them. I don't think it is hearsay unless he attempts to establish the truth of the matters asserted, but I think he can testify as to what he received.

THE COURT: I am going to let him answer.

BY THE WITNESS:

A I have received overwhelming vehement opposition from the people out on the line in forms of letters, direct telephone calls; I have attended meetings where vehement opposition was displayed—petitions with thousands of signatures on them. It is probably the most volatile subject that I can remember since I have been with TWA.

MR. HARTUNIAN: I move that all of that be stricken, your Honor, as that for which the hearsay rule was designed. I think it is hearsay.

MR. JOLLEY: Your Honor, I believe it is not hearsay. He can testify as to what was said, what he [52] has been told, and he can do so if he is not attempting to establish the truth of the matter asserted therein.

Your Honor, involved in this lawsuit, involved in this stage of these proceedings, is an unknown, previously untreaded water. What the burden is in this lawsuit is unknown, much less who has the burden. But assuming we are talking about serious adverse impacts, what does serious impacts include?

No court has given us any guidelines as to what is and what is not serious and unusual adverse impact. I think that the morale factor, the opposition of a predominantly female work force to a settlement provision that incorporates return of people who have been victimized allegedly by sex discrimination, I believe, is relevant. It could well be reviewed by this court or any reviewing court because it is still unknown waters that we are treading.

I ask that it stand, your Honor.

THE COURT: I am going to allow it to stand, but not for the purpose of establishing proof of the matter.

MR. JOLLEY: I have no other questions of this witness.

THE COURT: Cross?

[53] CROSS EXAMINATION

BY MR. HARTUNIAN:

Q Mr. Teolis, being familiar with the labor agreement, I wonder if you could answer this question for us: With respect to furloughs, furloughs occur at particular bases, don't they? They don't necessarily occur systemwide?

A That's true.

Q So that a furlough might be applied to Boston International or New York Domestic or Chicago Domestic without affecting any other base, is that right?

A There are sometimes furloughs that involve more than one domicile simultaneously.

Q My question is does a furlough necessarily have to be system-wide or may it be at one or another base?

A It can be one or another base.

Q Then I take it that a furlough occurs at a base where there is a surplus?

A Surplus as TWA sees it.

Q Yes. A surplus is defined, isn't it, in terms of whether TWA considers there to be a surplus?

A Yes.

Q So if the management of TWA decides that there are more cabin attendants or flight attendants at a particular base, then that means that there is a surplus, more than what they want, and that means that there is a surplus as [54] TWA sees it, is that right?

A Yes.

Q On the other hand, there may not be enough, in which case there is a vacancy or there are vacancies, correct?

A As TWA sees it.

Q Yes. And furloughs occur where there are surpluses, not where there are vacancies?

A We have had disputes about that in the past.

Q Well, I am not asking for the terms of disputes, but is it not correct that a furlough occurs where there is a surplus, not where there is a vacancy?

A Generally, yes.

MR. HARTUNIAN: I have no further questions.

THE COURT: Anything further?

MR. FORDE: I have one or two questions.

CROSS EXAMINATION

BY MR. FORDE:

Q Mr. Teolis, have any of the phone calls or any of the petitions that you have received from your union members distinguished between Subclass A and Subclass B?

A I don't know whether they were able to distinguish or not. They didn't tell me what class they were in.

Q Do you know what impact they would have on the seniority system if twenty or thirty returning mothers [55] from Subclass A joined the ranks of 7,000 TWA stewardesses?

A I don't know.

Q It would be minimal at best, would it not?

A I wouldn't be able to say.

MR. FORDE: That's all.

REDIRECT EXAMINATION

BY MR. JOLLEY:

Q Mr. Teolis, does TWA have to answer to anyone, including IFFA or its individually employed flight attendants, as to why it declares a furlough?

A No, it doesn't.

MR. JOLLEY: I have no other questions of this witness.

THE COURT: You may step down.

(Witness excused.)

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[TESTIMONY OF VICTORIA LEE FRANKOVICH]

[63] VICTORIA LEE FRANKOVICH,

called as a witness herein by the intervenor union, having been first duly sworn, was examined and testified as follows:

THE COURT: State your name and spell it for the record.

THE WITNESS: Victoria Lee Frankovich, F-r-a-n-k-o-v-i-c-h.

DIRECT EXAMINATION

BY MR. JOLLEY:

Q By whom are you employed?

A Trans World Airlines.

Q How long have you been employed by TWA?

A Since March 27, 1969.

Q What is your job classification with the company?

A Domestic service manager, based in Los Angeles, Domestic.

Q Do you hold a position in the Independent Federation of Flight Attendants?

A Yes, I do. I am the vice-president.

Q Is that a full-time position?

A Yes, it is.

Q How long have you been the vice-president of the Independent Federation of Flight Attendants?

A Since the certification of IFFA, which was [64] April of 1977.

Q Like Mr. Teolis, are you a member of the union's negotiating committee that negotiated these current collective bargaining agreements between IFFA and TWA?

A Yes, I am.

Q Vickie, what is your company seniority on TWA's record?

A My company seniority date is March 27, 1969.

Q Do you have any other seniority date maintained by TWA?

A I have an on-line date, which is the date I left training as a flight attendant and went to my first domicile, which is May 9, 1969.

Q In addition to company seniority, which is your date of hire, and your on-line seniority when you left training, does TWA maintain other seniority dates, other types of seniority dates for flight attendants in its employ?

A Yes, they do.

Q What are those?

A They maintain a vacation seniority date, they maintain a pay seniority date and they maintain a retirement seniority date.

Q Now, in this settlement agreement and in the American Airlines decision and other court cases, there are various [65] descriptions for a type of seniority.

I want to ask you, are the terms as used at TWA, as the union understands them, dating seniority, on-line seniority, job seniority, union seniority, occupational seniority and competitive seniority, are those synonymous and interchangeable terms?

A Yes, they are.

Q Vickie, I would like to hand you what has been introduced into evidence as Intervenor Union Exhibit 16, which is a list of competitive and noncompetitive seniority provisions of the collective bargaining agreement and the in-flight service manual.

Have you seen this exhibit previously?

A Yes, I have.

MR. JOLLEY: Your Honor, I wonder, I have a number of questions off of that list. Perhaps you might like to have the copy that we have given with the clerk to follow along.

MR. HARTUNIAN: Here.

MR. JOLLEY: Mr. Hartunian has provided you a copy.

BY MR. JOLLEY:

Q Vickie, what I would like to ask you to do is go through this exhibit in sequence as they appear on the exhibit, beginning with item 1:

"First access to rooms in specific overseas hotel"—

[66] and briefly describe what the provision refers to, and how an employee's advantages and disadvantages are affected by his or her relative seniority.

By seniority I am referring to competitive or union or bidding seniority.

A All right. Point 1 on the list is:

"First access to rooms in specific overseas hotels"—

the right-hand column indicates the article and clause from the contract which reflects this first point.

This essentially means when you arrive at a hotel overseas, the order in which you check into your room or which you receive your room will be determined by seniority. The most senior person would receive their room first, and if in fact there was a need to wait for a room, rooms are not ready at the time you arrive, the most junior person would be the person who would wait for a room that would subsequently be available.

Q Does this have applicability only on the international operations or flight attendants that are domiciled in an international domicile?

A There is a specific letter or agreement that refers to international, but similar procedures are utilized on domestics.

Q Next item 2.

[67] A Point 2 is:

"Equipment substitution"—

and several articles are cited from the contract and from the in-flight service manual.

Q What do you mean by—what is meant by "equipment," first of all?

A Equipment refers to the type of aircraft you would be operating on a given trip, and equipment substitution would be a situation where you have one type of an aircraft, usually a larger aircraft, a 747, for example, and you would have been initially assigned to fly, and when you showed up to take your flight due to some problem on the operation—mechanical operation of the equipment or some other difficulty—they have substituted for your piece of equipment a smaller piece of equipment and as a result there are crew members who would ordinarily have been on the larger equipment who will not go on the smaller equipment.

For example, a 747 would have some larger number of flight attendants covering that flight than would a 707. A 707 would have five.

Q What's the minimum and maximum for a 747 flight attendant crew?

A A flight attendant crew is twelve on a 747. The average flight attendant crew on a 707 is five. So when you went from one to the other you would have extra flight [68] attendants who would not be needed on the smaller piece of equipment.

Q Are there also differences in crew numbers between the L1011 and 727 and DC9?

A Yes, there are. So what these provisions allow is in the event of an equipment substitution where a smaller piece of equipment will be operating where a larger piece had originally been scheduled there are pay protections that are provided for those flight attendants who will now be surplus crew members.

Q When you say surplus crew members, what does that mean? What are you referring to?

A I am sorry. I mean people who will—as we only have five positions open on the smaller piece of equipment, you won't have all twelve people operating the smaller piece of equipment—somebody will be sent home.

Q What happens to those sent home?

A The language in these provisions specifically allows that the more senior people will receive pay protection and will not operate the flight. The more junior people will stay and operate the flight.

Q So the senior people will go home and get paid?

A They will get paid as though they actually operated the flight.

Q Have you completed your testimony concerning item 2?

[69] A Yes, that's essentially a summary of the —

Q All right, item 3.

A Item 3 is a jump seat authority, access to passenger's seat if arrival of flight attendants are at the same time, and the citation is a contract provision. This is an agreement that just went into our contract during the 1978 round of negotiations.

The jump seat provision is a contractual guarantee that allows flight attendants, if jump seats are not occupied by working flight attendants, that is, the seat that the flight attendant is designated to use is not in use because there are fewer crew members on a given flight than there are flight attendant seats, in that situation flight attendants on personal business may travel free of charge on the vacant jump seat.

Q Do they have to use a pass?

A No, they do not. This provision is essentially first-come, first-serve, which is not a seniority provision. However, if in fact two people arrive simultaneously and there is no way to determine who arrived first and would otherwise be entitled to the seat, it reverts to a seniority question and the more senior of the two people in the dispute would in fact have the advantage of taking the seat.

Q On the basis of on-line or bidding seniority?

A Bidding seniority, yes.

[70] Q Item 4.

A Item 4 is an important item for us. It is vacation bidding. It refers to a contractual provision.

This is the bidding you would use to determine in which month of the year your vacation would be. It allows people to determine if they can coordinate their vacations with their family, with their children, with their husband.

You bid in the previous year for vacation that you will be expected to take in the following year. If you are senior enough, you can split and have two vacations instead of one. You can have one over the holidays.

Q Christmas holiday, you mean?

A Christmas holiday, or any other holiday during the course of the year. The more junior people are awarded what's left.

Q Item 5.

A Item 5 is a list of items that all refer to the seniority provisions in the contract, Article X, Furlough, which is the first item, and the others actually refer to similar situations.

This essentially says that those people who will be furloughed out of either their location or their job category or their job altogether will be determined in inverse order of seniority.

[71] The most junior people will be ultimately subjected to the furlough action.

Q By furlough what do you refer to?

A Furlough, as we use it, refers to any downgrading from category, classification, change of status. From international service manager to international purser is a furlough, from international purser to international cabin attendant is a furlough, because those are pay grade differentials. Those are all considered furloughs.

The bottom would be a domestic cabin attendant furloughed out to the street without a job.

Q That's all done on the basis of inverse seniority?

A Of inverse bidding seniority, yes.

Q Meaning what? What do you mean by inverse seniority?

A The most junior people would go to the street before the more senior people.

The other items that I mentioned under number 5 are really similar. Reemployment after furlough is to say that, again, that would be done—the people who would be brought back are brought back in order of seniority. The most senior would be recalled first.

Choice of vacancy is the same idea. If there are options as to where you can go, the more senior people would be given the option rather than the junior people. [72] Q When you talk about where you can go, are you talking classification or location?

A We do not have recall right to location, we only have recall right to classification. So, for example, if I was furloughed out of the Kansas City domicile as a Kansas City domestic cabin attendant and tomorrow morning the company had an opening—

Q You mean furloughed to the street?

A Furloughed to the street without a job—and they had an opening tomorrow in Chicago, I would have to accept the opening in Chicago because I cannot—I don't have the right to wait for an opening in Kansas City. I am recalled to my classification, which in this case was domestic cabin attendant.

Q If you were living—your place of residence was in Kansas City, how would you under the contract—what possibilities are open to you for accepting a domicile position in Chicago?

A I would have to get to Chicago one way or the other. Either I would change my residence, I would move from Kansas City to Chicago at my own expense, or if my home situation did not allow me to move, I had children in school or something that precluded me from leaving the Kansas City area, I would commute from Kansas City to Chicago to the extent that that was possible, and to the extent that that [73] is possible

is determined by the number of passes that I would be allotted, which is also according to my seniority, and the type of flights that I would be able to fly in the Chicago domicile which would allow me more flexibility or less flexibility in terms of the flight schedules.

Q If the number of commutes in that situation exceeded the number of your pass allotment, would the expense of commuting between Kansas City, where you elected to stay, and Chicago, where you were flying out of, be your expense?

A Certainly. Yes.

Item 6 is the next item. That is Displacement.

Q Before you go down there, did you mention preference of assignment to equipment?

A No, I skipped that.

Preference of assignment to equipment is an issue that's mentioned in general terms, which is later reflected in the way you bid for your flight assignments. It is mentioned in the seniority article to the extent that again it just reinforces basic concepts of seniority. Everything will be done in seniority order, including the selection of the type of equipment you would be flying on.

Q What size plane you are flying on?

A Whether you are flying a 747 or 727.

Q The next item, number 6, Displacement.

A Displacement actually refers back to furlough, [74] which we just spoke about. When I am furloughed, I am given several options contractually depending upon what my classification is at the time.

Those options include going to a lower classification in my location, leaving my location, staying within my location, leaving my location changing classification or accepting a furlough to the street. A more explicit example: I am a Los Angeles international flight service manager and I am furloughed tomorrow morning. My option will include displacing to Los Angeles purser, which means I would have to take—

Q That's a lower pay classification?

A That's a lower pay classification. Displacement means I would move in and somebody else would move out. I would move them out by my displacement. They would be displaced by me.

Q On the basis of seniority?

A On the basis of my superior seniority to them.

The next alternative would be for me to leave and go to a different domicile where there is still a service manager opening.

Like instead of staying in Los Angeles, and bumping down to purser, I could go to New York, if there was an opening in New York as a service manager, and protect my pay, but suffer the cost of a move.

[75] Q You have to either commute or relocate?

A Yes, I do.

Q And if you commute, is that at your own expense?

A All the costs are borne by the employee.

Q If you relocate, are travel expenses paid by the company?

A No, they are paid by the employee.

Q Let me go back. In the event that you elect in your example to displace a purser also at Los Angeles International, a junior purser, what is that junior purser's option, the same option?

A His options will be similar to mine, except he—no one can bump up. You can only bump down.

The purser can't bump a service manager. The purser can bump an international flight attendant, domestic service manager, domestic cabin attendant, or can accept the option of being furloughed to the street.

The only difficulty in the reality of our situation is that because there is no recall to location, that option is rarely accepted.

Q Which option?

A The option of furlough is rarely accepted because your recall is to classification which you could ordinarily

have done anyway by just accepting the fact that you had to move or displace to start with.

[76] Q Are you saying if you accept a furlough you may have to go back to some other location around the system other than the one you are presently in?

A Correct. That actually refers back to the example I had earlier.

By accepting a furlough it doesn't solve any of my problems because the next day they can say we have an opening over here. You can't stay out on the street as long as there is an opening in a classification from which you left, regardless of whether or not it was in the location that you left.

Q An opening at another domicile?

A Correct.

Q While you are on domicile, would you explain what a domicile is under the contract?

A A domicile is a station where flight attendants are based—a station where flight attendants operate out of. It has nothing to do with where they live.

Fight attendants live at places far removed from their operating domicile. We have four international domiciles and seven domestic domiciles.

Q Do they receive their—do they bid for flights leaving and returning to that facility?

A That is correct.

Q They receive their supervision at that facility?

[77] A Correct, their mail from the company. They are assigned to that location. They report to work at that location.

Q Go ahead.

A I think that completes item 6.

Item 7 is Recall, which is again furlough-related. That is to say once I am furloughed I have the right of recall, which is the—it says choice of domicile here, but essentially it is only accurate if there are options of domiciles available when I am recalled. If there are no options of domicile available—for example, in my just recently

created example I was the Los Angeles domestic—Los Angeles International service manager who accepted furlough, and I am sitting in Los Angeles. It is not a week later and the company says to me, "We are recalling you to New York International."

I have the option of saying, "Yes, I will go," and transferring to New York International, which is at my own expense, or saying "No, I waive my right to recall," but I have to return to some place or I have just given up my job.

I don't have the right to refuse a recall, but that also is done in seniority order. I failed to mention that. All these things are seniority order options.

If there are two people to be recalled and [78] there is one opening, the more senior person will be recalled to the job before the more junior person will be recalled.

Number 8:

> "Transfer to different base station or job classification."

This is a contractual reference as well as a flight service manual reference, and it deals with something that happens very frequently in our industry, which is the movement of flight attendants from one location to the other.

Q One domicile?

A One domicile to the other.

The company maintains a list of standing bids on file where people put preferences—flight attendants indicate a preference of location to which they would be willing to be assigned in the event that the company creates openings. This list is posted at the beginning of each month or at the end of each month, and whatever time the company decides there are openings either in a classification or in a different location, they will post the openings and take people from that list and move them to another location.

Q Is Intervenor Union Exhibit 23 a copy of the standing transfer of bids on file?

A Yes, it is.

Q If any number of plaintiff class returns with [79] greater seniority than the people who presently have transfer requests on file and an opening—and put their name on a transfer list for a specific domicile, will seniority govern?

A Yes, it will.

Q Will the time of the entry of one's name on that list have anything to do with the filling of a vacancy?

A No, it will not. Seniority is the most important issue in connection with a transfer. When you file the transfer has nothing to do with it.

Q Have you completed item 8?

A Yes, I believe that completes it.

Item 9 is:

> "Employee involuntarily assigned to fill vacancies where no bids are on file."

This is a situation that occurs when there is no one who has completed number 8, which I just mentioned. For example, tomorrow morning the company might decide that they need to put additional pursers in the Boston International domicile and they might look to the list of standing bids on file and find that no one is interested in going to Boston as an international purser. So in order to fill that vacancy they then in inverse order of seniority find the most junior qualified employee in the system—you have to be qualified to be a purser—and will force them to move to cover the [80] vacancy.

Q Again if they move in that situation, would their expenses be paid?

A In an involuntary transfer, yes, you are paid for your move. This is a permanent transfer though, so you would be—you would only be paid if in fact you physically moved to the new location. If you chose to commute and not change your residence you would receive no compensation.

Q Would you then have to commute at your own expense?

A Yes.

Item 10 is:

> "Temporary vacancy when insufficient bids are received"—

which again refers to a contract clause. It is similar to the provision I just mentioned, except in item 10 the vacancy is slated to be temporary.

"Temporary" is defined contractually as less than 90 days—90 days or less is temporary.

In the event the company determines that there is a vacancy of 90 days or less, there is no one who has requested to fill a temporary vacancy—which would be on the same list that we just talked about—the company will involuntarily assign someone to fill the temporary vacancy.

Q On the basis of lowest seniority?

[81] A Lowest seniority.

Q The next item under 11—

A Item 11:

> "International operation of employees to fill temporary vacancies in bases outside the U.S."

This is again a contractual reference. It is a situation where the company has an operation—an overseas station, which they don't operate at the moment, but they used to have in Paris, Rome and Hong Kong, and they are taking people from—flight attendants from the United States to fill those openings.

The first people who are offered the openings are the senior people.

Q It is on the basis of most seniority?

A Most seniority. It is implied that it would be a preferable situation, so the most senior people who are interested would be sent.

Number 12 is:

"Bidding on vacancies existing on the system when returning from leave of absence."

Q Vickie, before you get to item 12, let me ask you a few preliminary questions.

In your capacity as vice-president of the [82] Independent Federation of Flight Attendants, do you play a role in systems scheduling?

A Yes, I do. I am chairman of the systems scheduling committee.

Q As chairman of the systems scheduling committee what do you do on a day-to-day or a monthly basis?

A Well, amongst other things, on a monthly basis the company constructs your bids, which are the lines of time, the flight assignments that flight attendants will be flying for the following months.

Q Give an example and tell how this is done.

A For example, a flight will operate from New York to Los Angeles and the company will take that flight and combine it with a flight that returns—where did I start—New York-Los Angeles-New York—and putting those two flights together with a report time at the beginning, a layover at the conclusion of one leg and a debrief, which is payment at the end of the flight. They have constructed a pairing.

Q A pairing is a trip out and a trip back?

A A pairing is a trip from your domicile, returning to your domicile. It outlines how many hours you will work, what days you will go to work, how many hours you will work that given day, and how many hours you will work in the entire round trip.

[83] Q Are these put together in any way over a span of a month for bid purposes?

A Yes. Once the company has constructed the initial pairing they then put together several pairings and construct what we call a line of time or a sequence, which

tells you on which days you come to work during the month, how many times you come to work during the month, how much overtime you will earn during the month, how many times you will go to the airport.

Q A line of time or a sequence—would it be accurate to describe that as a monthly schedule?

A Yes.

Q Would these change from month to month?

A Every month they change.

Q Do certain sequences or lines of time—can they be changed from one domicile and assigned to a different domicile?

A That happens every month. The company will decide for economic reasons that the operation of a flight that has been operating New York-Los Angeles-New York, at any given month because of equipment connections or because of the increase in hotel cost or some other financial consideration, instead of having that pairing assigned to the New York domicile, where it may have been for several months, they would reassign that to some other domicile.

[84] In this particular case it would most likely be the Los Angeles domicile. That happens frequently.

Q In your first instance I thought you said it was assigned to Los Angeles domicile.

A Maybe I am confusing my example. If I am going from New York-Los Angeles-New York, that would have been initially assigned to New York. The way they make that assignment to Los Angeles, they just start the trip out differently: You go Los Angeles-New York-Los Angeles.

They are still using the same flight.

Q But it would be flown by different flight attendants?

A It will have a different pairing number because you start out on a different one. You are just going the opposite direction.

It would be flown by flight attendants from the opposite coast. That's one of our concerns because it happens so frequently. People see their time floating back and forth. They feel they like they have proprietary rights to some of those flights because it is flipping across the system all the time.

Q How far in advance in the month are these pairings put together by the company?

A The union is allowed to see the pairings. We believe they are put together much in advance of when we are [85] finally allowed to see them.

We are allowed to see them, for example, the month of October, we would have a scheduling meeting the first week of October in which we would review the bids for the month of November.

The flight attendants would then see those bids on the 12th of October, a week later.

Q Are you involved in that scheduling meeting?

A Yes, I am.

Q Do you go over the projected next month scheduling with company representatives at that time?

A Yes, I do.

Q Is this before the sequences are posted for bids?

A Yes, it is before they are posted. They are put together in the condition that they will be then taken to the domiciles and posted, and we make whatever suggestions we might have for repairing or resequencing or some minor adjustment in the scheme of things.

Q Now, after you have met with the company and the lines of time are established, what is the process for getting those lines of time to a domicile for purposes of bid for the following month by flight attendants at that domicile?

What is the bid process and how are the bids awarded? I think that question goes to item 12.

[86] A The company has a computer center in Kansas City and the bids are all essentially done by computer-

ization. There is a good deal of manual input, but what essentially happens is that their computer system produces the bids that will then be sent to all of the domiciles that I previously mentioned, the eleven domestic domiciles and the four international domiciles.

Prior to the meeting that I attend with other representatives from the union scheduling committee, the company dispatches these computer runs to the domicile location so the domicile management has the new computer run in its possession at the time we have the meeting.

They then make any alterations that they agree to make to those computer runs. The domicile stations each individually send them to a printer, bring them back and distribute them in the mail boxes of the flight attendants. At each location flight attendants have mail boxes. That's where the company communicates with them.

The flight attendants then between the 12th of the month domestically and the 20th of the month, and internationally it is from the 10th to the 18th or the 10th to the 20th—it depends upon the location—flight attendants have an option to go in and look at what's available and select what they would like to fly.

They do this in seniority order. The most [87] senior people select the flights obviously first to the more junior people. They have the better preference of operating times and departure times and amounts of overtime, any other thing that might go into the selection of a flight schedule.

Q Is there a difference between the number of days of flying per month that a line of time would cause to be worked, in other words, might one line of time cause you to work twenty days a month and another line of time cause you to work nine days a month in order to get your required number of hours in?

A The current dispersion is exactly what you mentioned. For the month of October I think the least num-

ber of days that you can operate in order to fulfill your month is eight and the most is twenty-one.

Q Twenty-one days per month to get your hours in and the people bid this?

A Yes, they do.

Q Is this one of the factors they bid on the basis of seniority?

A Yes, it is.

Q What other factors might be involved on the basis of seniority for bidding a flight schedule?

A Someone might want to work a flight that is a turnaround, which is out and back, which means you don't lay [88] over. You just go to where you are going and you come back.

Some people prefer to work during the week and not the weekends.

Some people prefer to work during the day and not at night.

Some people might prefer to work one leg, which is, for example, like from Los Angeles to New York, a five-hour leg, instead of working three or four little-bitty legs to accumulate the same amount of time.

Some people might prefer to work different types of equipment, some people rather work 727 equipment than 747 equipment.

Q Do flight attendants bid on the basis of destination?

A Yes, some people—

Q Both international and domestic?

A Some people have relatives in different locations that they go to visit, or obligations that they want to meet in different cities, or just places that they have preference for visiting. So all these things—anything you can probably conceive of that makes one pairing or one sequence different from another might make it desirable to one person and undesirable to someone else.

Some sequences will allow you not to have to work on holidays. Of course, when you get into the month of December that makes that a highly preferable sequence

because we are not paid additional money for working on holidays. [89] So there is no reason for anyone to volunteer to work on holidays.

Q Do flight attendants bid for monthly sequences on the basis of how much money is going to be generated by this sequence as opposed to a different sequence?

A Yes, many people do.

Q Are there in fact differences between the pay yield between one sequence and another?

A Yes. The company's base guarantee without any overtime is 65 hours. There are some sequences which yield 65 hours. Some yield a little less, 64, not much less because they will pay you that amount whether you work or not.

On the opposite end, you have international lines of time that might yield 100 hours. Every hour from 65 to 100 is an hour of overtime. So people who are interested in generating overtime would obviously bid the sequence with 100 hours rather than the sequence with 65 hours.

Q Again bidding on the basis of seniority?

A All on the basis of seniority.

Q Have you completed that?

A Yes.

Q I think that really was probably number 13.

A Yes, it is. You are right.

[90] Q Your testimony really just went to item 13?

A O.K. We would have skipped number 12. Number 12 was:

> "Bidding on vacancies existing on the system and returning from a leave of absence."

That would deal with the question of when you have been on some type of leave—the normal provision would be that you come back to your domicile and fill the vacancy that you left.

If when you return there is no vacancy, this provision allows that you can displace someone who is junior to

you. In other words, you would move someone out of your spot and then they—

Q At another domicile?

A At your domicile. You go back in where you came. If there are too many people there, you replace or displace the person who is the most junior now at your location.

Q What happens in that situation to a person who is most junior at that domicile?

A Depending upon their relative seniority they would either go to another location or go to the street, depending upon the situation at the domicile.

Q If they went to another location, whose expense would that be?

A That would be theirs. What we were just speaking [91] about is really number 13, which is—

"Bidding for monthly flight assignments".

This is one of the most important aspects of the seniority because it controls your everyday affairs. It controls when you go to work, how many hours you work, what your destinations are, how many days you work in a month, how much overtime you have.

Q Does it control where you go to work?

A Where you go to work, certainly, all that.

The other things that are mentioned on this list are open time lines, reserve call on periods and reserve spreads. One distinction which I haven't mentioned is the distinction between a bid holder and a reserve. At the beginning of each month when the company provides us with these lines of time, the lines of time incorporate all of the flight time that the company anticipates that they will fly for the following month. They then create—those flights—

Q Is that the sequences that are posted for bid?

A Yes.

Q The anticipated time?

A Yes, all the time that they know they will be flying for the following month. When they actually award the

bids, the bids go to the domiciles, the flight attendants bid on the flights that have been posted. Those people who [92] are senior enough hold a bid. There are then some number of people, usually at least 15 per cent of the overall head count in any given location, will not hold a bid. They will instead be a reserve force who will not know in advance what their assignments will be. They will be used to cover unanticipated flight time, for example, charters that finalized after the posting of the original bids or unavailability of flight attendants during the month for sick leave or some other reason that made them unable to cover their flight.

Again, that is a seniority situation. A person who is a senior could hold a bid where the person who is a junior would be left without the bid and would be a reserve.

Q A reserve does not have a schedule?

A No, they do not.

Q A reserve does not know in advance what schedule he or she is going to fly?

A No, the only thing they have—the one thing that is mentioned here, which we newly negotiated in '78, is the ability to call in to talk to the company to say, "What flight are you going to put me on as a reserve?"

You call in either in the morning or at night.

That is also generated by your seniority. The more senior reserve might elect to receive a night- [93] time call in, which means if they call in at midnight they will be assigned flights leaving the following day. So they will be flying daytime flights. Whereas the more junior reserve would receive the daytime call in, which would mean oftentimes they would be flying at night.

Q Are there reserves, reserve flight attendants who would have to report for a flight on short notice?

A Yes, there are. There are reserves who are on standby. Immediate notice is as short as it can be.

You can live up to two hours away from the airport, but the company has the ability to call you and in fact

it is mandated by circumstances. If a flight attendant fails to show up for departure and she fails to show up or he fails to show up at such time to allow the company an hour and fifteen minutes worth of notification, the fact that you live two hours away from the airport doesn't stop them from calling you and saying, "We now have an opening on this flight, make an attempt to get here."

The person who would be in that position would be a standby reserve who would be waiting for that type of call and would make an effort to cover the opening.

Q In previous testimony you testified that in certain furlough situations a junior flight attendant could transfer to another domicile to avoid furlough.

A You are talking about displacement?

[94] Q Yes. One of the options open, you testified to, to such a flight attendant, would be to either—

A I wish you wouldn't use the word transfer. It is a confusing term. Tranfer is a voluntary situation. Displacement is an involuntary situation.

Q Thank you. The flight attendant is displaced to another domicile, he has the option of commuting or moving. Could a flight attendant who is going to be junior enough to be on reserve from a practical standpoint commute?

A Well, the difficulties are inherent in the definition of reserve. A reserve, by virtue of not having an assigned flight, must be available for immediate call when they are placed on standby.

You are subject to being placed on standby on a rotational basis with the other reserves in your domicile. There is no way to tell which point you might be on standby and be forced to be immediately available.

So there are some difficulties in getting yourself back and forth, depending upon where you are located.

Q Have you completed your testimony on number 13?

A Yes, I believe so.

Number 14—

Q The second page, this is still continuing on—Competitive Seniority.

A Yes. These are all competitive seniority items.

[95] Number 14 is:

"Bidding working positions on the airplane."

This is not a contractual item. This is a service manual reference.

When I show up in the morning to work my flight and there are five people there who are all going to go on this flight, the determination as to who will work which position, who will work in the galley and who will work in the aisle, will be decided by the seniority of the people who are there.

Q Item 15.

A 15 is:

"Promotion to higher paying classification, pursuit of service managers"—

that is exactly what it says. The ability to transfer or be promoted from, for example, a domestic cabin attendant position to a domestic service manager position, which is a higher paying category, would be determined by your relative seniority and the seniority of those people with a request on file to fill the same position.

Q Would that also be true in international?

A Yes. It is true in every category upgrade.

Q That's on the basis of highest bidding seniority?

A Yes, it is. The only distinction is in the [96] service manager and purser position, where there is an additional qualification of a language qualification, within qualified people the ability to obtain the job position is determined by your seniority.

Q You mean by that a language—a two-foreign language qualified individual would take precedence regardless of seniority?

A For example, I am not two-language qualified. If I could obtain a two-language qualification and I am

senior, then I would get the job. If I cannot qualify, then I would not get the job unless I am pre-1959 because we have a specific agreement to cover people when there wasn't previously a language qualification.

Q Item 16.

A Item 16 is:

> "Priority for access or upgrade to first class when dead-heading on a Class B positive space pass."

That is not a contractual item. It is a flight service manual reference, and it is exactly what it says.

Class B pass—Class B positive space pass, first off, is the classification the company gives you to travel on when you are traveling from your domicile to a location to protect a flight or in the reverse, you have just protected a flight and you are returning home afterwards. [97] That is a dead-heading status, you are not working. You are just going some place.

Q But not for your own pleasure?

A No, not on personal business, on company business, to protect an operation—to protect a flight. A Class B positive space pass provides you will not be removed from that flight, you are a must-ride on the flight for which your reservation is made for purposes of dead-heading.

That is important because if you are not a must-ride, you often won't get on the flight, and the flight you were going to protect would be unprotected. It would be minus you.

A The only aspect of this that is dependent upon bidding seniority is that the reservations on a Class B pass are all in coach. So if I were to show up, I would be put in coach unless there were seats available in first class, and a determination as to who out of the group of us who are dead-heading on the flight would be upgraded from coach to first class will be dependent upon our bidding seniority.

Q Now, I think that completes the noncompetitive portion—I am sorry, strike that.

That completes the competitive portion of Intervenor Union Exhibit 16.

There are four more designations under the [98] general heading of Noncompetitive Seniority. Would you briefly testify what those are and how they are determined, as opposed to bidding seniority?

A Pay scale progression is what I referred to earlier as pay seniority. Pay scale progression is determined by the time when you begin your job as a flight attendant, when you leave the training center. It is adjusted for leaves of absence. At one time it was adjusted for furloughs. It deals with how you are paid as a flight attendant. That's seniority separate from other seniority. It is not competitive. How I am paid—I don't have to compete with someone for my pay scale.

Q Regardless of how many people have been working longer than you—

A They will get a higher rate of pay—

Q —but you still get your ten years or fifteen years?

A Correct.

Q Pass allotment—my pass allotment is generated by company seniority. Company seniority accrues from your date of company hire. This is particularly relevant for people who have been in a job classification with the company prior to starting as a flight attendant.

For example, someone could have been a ground agent with TWA and therefore have company seniority prior to [99] starting as a flight attendant.

For example, someone could have been a ground agent with TWA and therefore have company seniority prior to their starting as a flight attendant. That controls what the pass allotment system—when you go from limited passes to unlimited passes, when you go into a term pass, and those things cost different amounts of money, provide you more freedom of travel.

Q You are right, your passes do not depend upon any other person's rights to passes?

A Absolutely not.

Q Next.

A Vacation Days. This is as distinguished from the previous vacation bidding that we mentioned earlier because vacation days is a seniority classification of and to itself. It accrues from the date of hire, and it will govern whether or not you will receive 23 days this year or whether or not your seniority will generate 30 days this year, not which months you will get, but how many days you will be entitled to at the the outset. That's noncompetitive.

Q Next.

A Retirement Benefits are also noncompetitive. Retirement benefits idealy accrue from your date of hire with the company, but the rules state that your retirement service will be determined by years of service with the company. [100] So it is reduced by time spent in a non-pay category, classification such as furlough, such as leaves of absence.

So the dates are—it really does not reflect the fact that you were hired in 1948 and have worked until now, because that date keeps moving up every time you are in a non-pay category.

So that date would be potentially different from several of the other dates that have been mentioned here.

Q It may not show my actual date?

A No, it in all likelihood will not.

Q If I was hired January 1, 1948—really and truly hired January 1, 1948—and had a layoff or furlough or period of disability of nine months, what would that date show as my hire date?

A It would be nine months later than your original date of hire.

Q October 1 or September 1 of 1940, or whatever the date was?

A Right.

Q Is the on-line date, the bidding seniority date to which you testified at length, subject to adjustment? Have flight attendants competitive bidding seniority date been adjusted for some reason or another?

A It is no longer subject to adjustment, but that [101] is a very recent change in the agreement. In fact, in the very recent past you were subject to adjustment. Until 1973 people who went on leave of absence were subject to bidding seniority adjustment if their leave was longer than a certain duration.

Q Does their seniority today in 1979 still reflect those adjustments that were made?

A Yes, it does. Many of the provisions have changed over the course of years, but the adjustments that have been made have remained and they have only been perspective changes.

So, you know, people from this date on don't suffer that consequence, but people in the past have all sorts of adjustments.

Q What other incidents or occurrences have resulted in adjustments of bidding seniority of present on-line flight attendants?

A Leaves of absence. That includes maternity leaves, medical leaves, personal leaves, educational leaves, every leave but industrial injury, which was not adjusted for.

I think also at one time furloughs caused an adjustment.

Strike, we were adjusted 43 days for the 1973 strike on our bidding seniority.

Q Is that still reflected on the seniority records?

[102] A Yes, it is. It causes a reduction. That also affected the vacation seniority which was changed. It affected your pay seniority. It affected your bidding seniority. It did not affect your retirement seniority, only because it was too cumbersome for the company to bother with, so they didn't change that.

Q Vickie, if any given number of members of the plaintiff class, any number returned to any domicile, five returning class members, ten returning class members, twenty returning class members, to any given domicile, what effect would this have if any in general on the seniority-related advantages or disadvantages of on-line flight attendants under the contract?

A Regardless of the number of people who return, any person who returns with seniority that is higher than any one person in a domicile will cause an effect on the person who is junior to the person who has newly entered the domicile, obviously affecting the rights of bidding on all the things we have just been discussing: when you receive your vacation, when you go to work, how many hours you work, how much overtime you work, whether you can obtain your weekends off.

The things you work into your lifestyle that you come to expect by virtue of what your bidding seniority allows you to buy in your work situation is altered. If you [103] are no longer able to obtain that same—the same things that you previously were able to obtain, if somebody comes in and diminishes your ability to bid and obtain the same days off or the vacations or in a furough situation, causes you to be furloughed where you wouldn't have been furloughed before, those are adverse effects that could be suffered by the addition of someone with additional seniority into any given location.

Q Are you domiciled at Los Angeles Domestic?

A Yes, I am.

Q Are you familiar with both Los Angeles-Domestic and Los Angeles-International domiciles?

A Yes, I am.

Q You talked about bidding monthly lines of time. You talked about schedule holders as opposed to reserves. How many years does a flight attendant have to be employed as a flight attendant in Los Angeles

International before he or she gets sufficient seniority to bid for and hold a schedule of flight time?

A In Los Angeles International the current most junior person holding a bid line is 1966.

A So people below 1966 seniority are still in reserves?

A Are on reserves. They are not holding bids.

Q Do you know what the average seniority, bidding [104] seniority is of present flight attendants?

A On the system?

Q Yes.

A Our most recent analysis yielded an average seniority of nine years. That's bidding seniority.

Q If a returning class member having an average seniority of fourteen or fifteen years returned to Los Angeles, what's the effect on Los Angeles International?

A Of course, depending upon how many people return and how the company absorbs those people and what they do, all those things are totally speculation at this point. Obviously, if the average seniority on the system is nine years and a junior bid holder in Los Angeles International is thirteen years, people whose average seniority is more than thirteen years, who enter a domicile, you are likely to have a greater number of people who are not going to become bid holders.

Their expectations of becoming bid holders obviously have to be changed by virtue of people who now have entered at a higher level of seniority than they are.

Q What would happen to those people who are presently bid holders with 1966 or 1967—1966 or 1965 seniority?

A If the company doesn't expand the number of bids that are offered in that domicile, which is very unlikely in this example because there is only one flight in that [105] domicile, someone will—

Q What do you mean by that, there is only one flight in that domicile?

A Los Angeles International operates primarily the polar flight from Los Angeles to London and from Lon-

don to Los Angeles. They occasionally receive other flight segments where they might go from London to Paris, which is a very short flight segment that's not worth a lot of time.

The primary reason for that operation is to cover the polar operation. There is only one flight. There isn't a lot of variety that you can—

Q Only one flight?

A One flight per day, which operates daily. So unless the company compensates by putting additional flight time into that location, those people would be furloughed, would not have expectations of holding flights. There isn't any reason to assume that that would happen. It depends upon how the company reacted to this situation.

Q If persons presently holding flights have less seniority than returning class members, what would happen?

A They would probably not be holding the flight, they would be absorbed into the reserve pool.

The company can't create bids that are not there. They can create additional reserves that are not there by just absorbing people if they elect to do that, but [106] they can't create bids that are not there.

Q Would flight attendants with as much seniority as you just testified about at Los Angeles International, thirteen years to hold a line of time—would flight attendants with that much seniority be similarly affected at other domiciles or would the impact be less?

A Well, the impact would not be different. It would just hit a different seniority of person.

Q It would hit a lower seniority?

A Yes. The Los Angeles International location is one of the most senior locations in the system, so the impact is—harms more senior people at that location.

In any location where you have senior people entering the location, there will be an impact, but it may well be impacting people with lesser seniority.

In Los Angeles Domestic, I believe the latest statistics show that the most junior bid holder is 1972 seniority,

so there the impact would be on a lesser group. You are holding a line with nine years of seniority—excuse me, seven years of seniority—where as in Los Angeles International you are on reserve until thirteen years. So the impact would be the same. It would just affect a different seniority of person.

Q Even in Los Angeles Domestic, if returning members of the plaintiff class have more seniority than people holding [107] a line with seven or eight years, what would be the impact upon those people holding a line with seven or eight years?

A If the people—if the company does not respond by creating flight time that is currently not there, those people will be on reserve.

People who are now holding line will be on reserve. There will be no alternative—or they can displace them out of the location and put them some place else.

Q What about the junior reserves when the people holding the line come into reserves?

A They will presumably be furloughed.

MR. FORDE: Your Honor, I object to some of the speculation.

Do you have any other questions?

MR. JOLLEY: Your Honor, I have no other questions.

THE COURT: Cross examination.

MR. HARTUNIAN: I have just a few questions.

CROSS EXAMINATION

BY MR. HARTUNIAN:

Q As I understand your testimony, people bid for lines of time or these sequential postings based on whether they might prefer greater hours or lesser hours, as one example, is that right?

[108] A Yes, that's true.

Q One person may want a lot of hours and bid for a sequence which affords a lot of hours, right?

A That's true.

Q But similarly, someone else might not want a lot of hours and would bid for those sequences which have less?

A True.

Q Some people might want to bid the lowest number of hours possible per month? They would scan that list looking for the briefest schedule, if I am using the word that's appropriate, is that right?

A That's true.

Q It depends upon your druthers. Some people like one thing and some people like another?

A That's true. There are tendencies, of course. You can outline which things tend to be senior and which things do not, but certainly—

Q You have answered the question.

Similarly, some people might prefer turnaround flights and bid for those sequences which involve turnaround flights?

A True.

Q But similarly, other people might want a layover somewhere else, or layovers during the month, is that right?

A That's true. You can see that the most senior [109] people tend to prefer the layover—the non-layover situation.

Q If you can answer the question Yes or No, it might speed this thing along.

Some people would prefer a 747 so they would bid that sequence because of the attraction of equipment for whatever reason?

A That's true.

Q Similarly, somebody might not want a 747. They might want a 707 or a 727. Again, it is a matter of bidding your druthers?

A Because your seniority allows you to do so, yes.

Q Is that right, Ms. Frankovich?

MR. JOLLEY: I think she is entitled to explain her answer. I don't know that there is any rule that says he can shut her off when she is giving her answer.

MR. HARTUNIAN: Nobody is being shut off. If Mr. Jolley thinks there is some explanation, he is going to have his opportunity to do so.

If a question can simply be answered Yes or No, I think that's adequate.

THE COURT: Yes. Try to answer the question as simply as you can.

THE WITNESS: Thank you.

BY MR. HARTUNIAN:

[110] Q Some people might prefer day flights and others might prefer night flights, right?

A True.

Q Some people might prefer and bid for weekdays while others would just as soon bid weekends and have the minimum number of weekdays?

A True.

Q Now, you have talked about reserve and what it means to be on reserve. I take it that's the less desirable of the various kinds of classifications that you might fall into at any one place or another?

A It tends to be if you look at the seniority of the people who are on reserve, yes.

Q Isn't it a fact that some people prefer reserves and bid reserves?

A There are some people, but the statistics would show—

Q Is that right? There are some people who prefer reserves and for it?

A Yes, there are.

Q I believe you testified that upon the return of any class member, one or more, to any base, that will have

some impact on everyone who is junior to her at that base, right?

A Yes, I believe that is true.

[111] Q Is it your belief, Ms. Frankovich, that—let's take a hypothetical. I will try to be as close—as accurate as I can.

Let's take Boston. Just arbitrarily let's say there are 700 flight attendants or cabin attendants based in Boston Domestic. Is it your belief that with 700 women there, because TWA wants 700, that upon three class members coming back who want Boston, that TWA will put them in and therefore have a surplus of three?

A I have no idea. It would be totally speculation on my part to determine how the company would react to this. We can't get a firm answer from them on how they intend to deal with it.

Q If the firm answer turned out to be that no class member could come back to Boston unless there was a vacancy, that would be important for you to know, wouldn't it?

A It would be important if we were guaranteed that they would not furlough—

Q Ms. Frankovich, would it be important?

A It would be important, yes.

Q Would it be important for you to know if it happens to be the case that in no event will TWA bring a class member back and therefore force somebody out on furlough?

Woud it be important for you to know that [112] no such thing will happen, if that's the case?

A If you are speaking of Mr. Crombie's disposition—

Q Excuse me, Ms. Frankovich, I just want to know one simple thing: I want to know if that would be important for you to know—either it would or it wouldn't.

A If it actually was the truth, yes, it would.

MR. JOLLEY: Your Honor, I am going to object to counsel trying to cut the witness off. We are in an area—

the question is is it important. It cannot be answered Yes or No. It is imperative that the witness be allowed to explain that answer.

THE COURT: Well, I believe you will have an opportunity to do that on redirect. I think you know that.

MR. HARTUNIAN: Would you read the question back, please.

(The pending question was read by the reporter.)

BY THE WITNESS:

A My answer would be Yes.

BY MR. HARTUNIAN:

Q Now, furloughs don't happen at bases where there are vacancies?

A Sometimes they do. That is in fact one of our difficulties.

[113] Q Well, isn't it a fact, Ms. Frankovich, that in order for there to be a furlough there has to be that number of women at a base which exceeds what TWA wants to see at that base?

A Mr. Hartunian, the difficulty in our situation is that that is not the fact.

Q Excuse me, Ms. Frankovich, first let's find out if it is true or not, and then we can get into the whys and wherefores.

Would you like the question read back?

A I think the question is a difficult one to answer without being inaccurate.

Q Let's have it read back so we are sure—

A I am sure of the question. My answer would have to be No.

Q There does not have to be a surplus in TWA's mind in order for there to be a furlough?

A If you care for me not to explain my answer, I will have to say No.

Q I just want to know, is it correct or is it not correct. When TWA furloughs somebody, that means by definition that there are more people at that base than what they want?

A At that given moment in time?

Q Yes. So that being the case, that also means that [114] by definition, at that given moment in time there certainly is no vacancy, right?

A The difficulty is they do these things simultaneously. They issue vacancy notices and furlough notices in the same day, Mr. Hartunian.

Q Ms. Frankovich, I just want to know, is it or is it not true, that by virtue of what you just said in terms of what a furlough means, namely that that means that TWA considers there to be a surplus at that given moment in time—

A That is what it should mean.

Q —that means by definition that at that given moment in time there is no vacancy, is that not correct or is that correct?

A That is what it should mean.

Q Do you know or do you not know whether or not the settlement agreement provides that no class member will be returned to any base unless there is a vacancy? Do you understand that, or do you have some other understanding?

A I am concerned as to the accuracy of that kind of guarantee.

Q Ms. Frankovich, I want to know if your understanding is or is not that no class member will return to a base unless at that given moment in time there is a vacancy.

[115] Do you understand that to be correct, or do you not?

A Mr. Hartunian, the individuals in the corporation who I have spoken to, including Mr. Hank Ward—

MR. HARTUNIAN: Excuse me. May I object for two reasons?

The objection is being not responsive and it is now getting into hearsay.

I think the question is one which can be answered Yes or No, unless I put it badly.

THE COURT: Sustained.

THE WITNESS: Would you repeat the question, please.

MR. HARTUNIAN: Would you read the question back, please.

(The pending question was read by the reporter.)

BY THE WITNESS:

A I believe that is what I read in Mr. Crombie's deposition.

BY MR. HARTUNIAN:

Q Have you read the settlement agreement?

A I have read portions of it. I haven't read the entire settlement agreement, no.

Q Did you read the portion that has to do with [116] when class members will be allowed to return to a base?

A No, I don't believe that I have.

Q Ms. Frankovich, I believe you testified in answer to an example Mr. Jolley put to you about the impact of seniority and other facts relating to the Los Angeles International list, is that right?

A Yes, I believe that I did.

Q You are concerned about what will happen to some of those women at Los Angeles International if some class members come back with a lot of seniority, right?

A Certainly. Any seniority will affect someone.

Q Do you know how many people are on the Los Angeles International list right now?

A I believe the requested list was eight.

Q I mean how many people comprise the Los Angeles International list right now.

A Oh, you mean are currently in the domicile?

Q Well, maybe I am mistaken about the use of words. Domicile includes all of Los Angeles?

A I am sorry, I don't understand. Are you asking how many people are currently domiciled at Los Angeles International?

Q Yes.

A I believe the number is about 168 or so, 161, somewhere in that vicinity.

[117] Q Well, one of the—one of your union exhibits shows 208.

A Well, then that's probably accurate.

Q That's excluding the in-flight service managers. Would that be correct if your exhibit shows 208?

A If that's what our exhibit shows, then it certainly is correct, yes.

Q Now, some of those 208—I don't know how many—but some of them are class members, aren't they?

A I don't have that information. That may be the case.

Q Now, with respect to those class members who are not now employed, in other words, the ones who will be coming back as you use that term or a similar term, do you know how many class members both A and B have requested Los Angeles International as their first choice?

A That's what I mentioned earlier. I understood the number to be eight.

Q Would it surprise you to find out that it is five?

A The number I was told was eight. If you are saying it is five, then I believe you that it is five.

Q I am. I believe eight includes the three who are already working there and they are included in the group that you testified concern you so much.

So we have 208 employed there now and five [118] have asked for—had asked for as their first choice Los Angeles International, right, and there is no assurance

that those five or any of them will be assigned to Los Angeles International, is there?

A I don't know what arrangements the company will make, Mr. Hartunian.

Q You don't know is a good enough answer for me, Ms. Frankovich.

If some of them eventually do become assigned to Los Angeles International, you don't know when that will be, do you?

A Most certainly not.

Q If that were not to happen for, let's say, a year and a half to two years, during that time those 208 women now domiciled at Los Angeles International, they keep building up seniority all during that time?

A Certainly.

Q The class members who are waiting, they don't get any seniority between now and then, do they?

A I suppose it depends upon the decision of this court.

Q That's not correct, but what you are telling us is you dont' know, right?

A I thought that this court would in fact determine whether or not the returning class members would bring [119] accrued and retroactive seniority into the job.

Q I don't want to argue with you and I guess I am not really, but I will just inform you of something concerning this and that is there is no dispute, and that the most seniority the class members can get in this case is that which accrued up to the date of the agreement, which is in August or July.

A I was unaware of that.

Q So you understand that and it will make it easier for you to answer some of these other questions.

Now, I take it that international is in the minds of yourself and most stewardesses something desirable compared to domestic?

A Yes, it is.

Q Do you know how many there are currently employed at New York International, not service managers, just cabin attendants or pursers?

A I believe the number is somewhere around 1500.

Q Do you know how many class members have indicated that they want to return there as their first choice?

A Off the top of my head—I don't have the list with me—I believe your number was somewhere between thirty and fifty.

Q Well, it is 29 out of 1,451, do you know that?

[120] A If you are telling me that, then, yes, I know that.

Q I believe you testified as to what might happen to some woman or man who is kind of junior—juniority is relative, isn't it, as seniority is? It is just the opposite, is that right?

A Yes, that's true.

Q Somebody may be kind of junior or very junior or sort of junior or maybe, as I have seen one term used here, the most senior junior.

With respect to some women at Los Angeles or some place who are on reserve or who have been able to hold a line of time, but they are one of the most junior people able to do that, we are talking about a hypothetical woman who in Los Angeles might have seven or eight years' seniority—

A Los Angeles Domestic?

Q Yes—

A Los Angeles Domestic, yes. The most junior bid holder might be seven or eight years' seniority.

Q That's the worst example in the country, isn't it, Los Angeles?

A On the domestic operation I believe it is almost equal by San Francisco, but it might be a little worse than San Francisco.

[121] Q New York, on the other hand, someone on reserve would probably be someone just recently hired, is that right?

A Probably 1977 or '78.

Q Now, with respect to the hypothetical woman that you posed as having felt some impact from the return of a class member senior to her, that person would then occupy a position after the return of the class members which would be no worse than what would have happened had that class member never been fired in the first place, isn't that right, Ms. Frankovich?

A Presuming that that class member had worked all of these years, yes.

Q Yes. We are presuming that. You understand that—

MR. JOLLEY: Objection, your Honor. We don't presume that.

MR. HARTUNIAN: Yes, I think we can, because the only people entitled to reemployment are those people who would have been ready, willing and able to work all these years up until now.

MR. JOLLEY: As a matter of fact, your Honor, one of the exhibits we offered in evidence, based upon company records, shows when the policy was changed whereby flight attendants who became pregnant and had [122] children were allowed to return back in 1970.

Mr. Crombie testified there was an average seniority at that time of twenty-two months, and in 1971 and 1972 less than half of those able to return did in fact return.

So we definitely do dispute that, your Honor.

MR. HARTUNIAN: We don't need to quarrel about anything, your Honor. The important thing is that nobody who was not ready, willing and able to work yesterday is entitled to reemployment in this case, period—end of argument.

THE COURT: I think that's a fact.

BY MR. HARTUNIAN:

Q So that your qualification is well taken, Ms. Frankovich, so with that in mind, is it not categorically correct that any woman who will be junior to a returning class member will be no more junior and no worse off than if the returning class member had never been illegally fired in the first place?

A And had been in the same location at the same time, right.

Q And all other things, of course.

A Yes.

MR. HARTUNIAN: I have no further questions.

[123] THE COURT: Mr. Forde.

MR. FORDE: I have a few questions, your Honor.

CROSS EXAMINATION

BY MR. FORDE:

Q Ms. Frankovich, have you made any analysis of the impact it might have on any flight attendant by the infusion of twenty-five to thirty returning mothers in Subclass A?

MR. JOLLEY: Your Honor, that assumes a fact that is directly contrary to the position taken by counsel that there is forty-nine returning mothers in Subclass A. It points out the particular problems we have been having in determining who we are talking about.

MR. FORDE: No, the confusion is in your mind. The —there are forty-nine class members or fifty class members in Subclass A.

MR. JOLLEY: Who have returned claim forms.

MR. FORDE: Who have returned claim forms. Not all of them have asked to come back to work, and I used an approximation. I said from twenty-five to thirty.

I think we are dealing with approximations, which is accurate enough when we are talking about approximately 7,000 flight attendants.

[124] BY MR. FORDE:

Q Have you made any analysis?

A I think our analysis has dealt with the group as a whole.

Q You never made any individual analysis as to the impact of Subclass A?

A I don't believe—

Q Whether it would be twenty-five, thirty or fifty.

A I have not directly participated in the analysis. That has been done by our organization, but I believe that in fact it included the entire group.

Q And you know of no individual study with respect to Subclass A?

A No, I do not.

Q Now, when you testified—and I believe you called it speculation, did you not—as to the impact on Los Angeles International in particular? You did use that word speculation, didn't you?

A Well, as I mentioned, any person who comes in with additional seniority has absolute impact on those junior to her, however, the overall impact would have to be speculation because I don't know what the company will actually be doing when people return.

Q When you testified with respect to Los Angeles [125] International in particular, did you consider the fact that no one in Subclass A had requested Los Angeles International?

A No, I did not.

Q Now, there are—with respect to your testimony in general about the benefits of bidding, you said—and I think Mr. Hartunian went into this to some degree—that there are various motives as to why an individual flight attendant might bid a particular route, is that correct?

A That is correct.

Q Some like days, some like nights, some like to stop where they can ski, some like to stop where it is warm in the winter?

A Well, I didn't particularly mention those that you characterize, but while that may be reality, that wasn't what my testimony was.

Q Now, it's true in that basis that someone very senior might select a particular trip that would be considered very undesirable by someone else, is that not correct?

A Yes, but there are obviously trends.

Q But someone might?

A Someone might, certainly.

Q So it is very possible you could bring in a number of new flight attendants and that particular senior flight [126] attendant would not be affected at all because no one wants her route anyway, is that correct?

A If she was totally out of character with the seniority bidding, yes, you are absolutely correct.

MR. FORDE: I have no further questions, your Honor.

THE COURT: Any redirect, Mr. Jolley?

MR. JOLLEY: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. JOLLEY:

Q Vickie, you were asked on cross examination whether it would be important for you to know that TWA would not bring class members back to a domicile and then therefore force somebody out on furlough.

You testified that it would be important for you to know that.

Does that give any assurances that there will in fact be no furlough at any time thereafter, following the return of a class member to a domicile?

A No, that is precisely the problem with which we deal.

The point that I was attempting to make with Mr. Hartunian was the difficulty in our situation—is the company is not reportable to us as to the reason for the furlough or their vacancy notices, and that in fact we have [127] situations which occur with regularity where a vacancy will be filled and a matter of days later the same individual or an individual more junior will be furloughed.

The explanation is Yes, there was a vacancy yesterday and there is not a vacancy today, but those are not acceptable answers. In terms of a guarantee that, Yes, we will not furlough anyone today, to bring someone into this domicile today, that dosen't guarantee that tomorrow they will furlough and call it by some other name, say it is a furlough, because of something else, because we have no way to control the reason.

The reason doesn't change the action.

Q If in fact a given number of returning class members goes to any domicile and for reasons either related or unrelated to that return there is thereafter a furlough, what's the impact upon people that are below the returning class members in point of view of seniority?

A People who would previously not have been subject to furlough will be subject to furlough by virtue of the fact that there are now people in the location who have more seniority than they do.

Q Forgetting completely about the possibility of furlough, all the other adverse impact that you testified about would still remain true as to bidding, vacations, monthly bidding, et cetera? The impact on people junior to [128] returning mothers with more seniority would still be true, is that correct?

A Certainly.

Q Several times you acknowledged that a senior person may in fact bid for a flight that is considered undesirable. You testified that, yes, some people will bid

reserve. They will bid to be on reserve rather than hold a schedule.

You testified those were contrary to trends.

Do you review bidding on a system-wide basis and deal with the company on a monthly basis system-wide on those bidding—on those bidding processes?

A Yes, I do.

Q Are you familiar with the bidding procedures?

A Yes, I am.

Q What are the bidding trends that you testified to?

A Well, we make recommendations on the construction of lines of time and the construction of pairing as a union, based on the premise that there are certain features which are desirable and certain features which are undesirable.

It is undesirable, for example, to work several legs in the middle of the night. That is a feature which we would attempt to diminish to the extent that we could by modifying the bid package.

[129] There might be someone who likes to work several legs at night, but that's not something we would tend to encourage as an organization.

Q Do senior people tend to bid reserve?

A Not with any regularity.

Q Do flight attendants with more seniority tend to bid flights with a higher pay yield, more pay hours involved?

A Yes, they do.

Q Do senior flight attendants tend to bid flight sequences that allow them to get their 75 hours in, for example, in as few days as possible during the month?

A Yes, that's true.

MR. JOLLEY: I have no more questions.

THE COURT: Anything further?

MR. FORDE: Nothing further, your Honor.

THE COURT: You may step down.

(Witness excused.)

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[TESTIMONY OF JOAN CARLSON]

[174] JOAN CARLSON,

called as a witness herein by the plaintiffs, having been first duly sworn, was examined and testified as follows:

THE COURT: State your name and spell it for [175] the record, please.

THE WITNESS: Joan Carlson, C-a-r-l-s-o-n.

DIRECT EXAMINATION

BY MR. FORDE:

Q Spell your first name, please.
A J-o-a-n.
Q Where do you live, Mrs. Carlson?
A I live in Palatine, 329 South Bothwell.

MR. FORDE: You have to talk nice and loud—

THE COURT: I think Mr. Jolley will have a very difficult time hearing you.

THE WITNESS: O.K.

BY MR. FORDE:

Q How old are you, Mrs. Carlson?
A I am thirty-six.
Q Are you married?
A Yes.
Q How long have you been married?
A Fifteen years.
Q Where are you employed at the moment?
A TWA.
Q Are you a flight attendant at TWA?
A Yes, I am.
Q How long have you been an employee of TWA?
A Since 1963.
[176] Q How old were you then in 1963?
A Twenty.

Q Was your first real job with TWA?

A Yes.

Q When you were employed in 1963, in what capacity were you employed?

A As a flight attendant.

Q How long did you serve as a flight attendant?

A Until 1965, when I had—

Q Did you take maternity leave in 1965?

A Yes, I did.

Q When was your child born?

A In November of 1965.

Q After that maternity leave did you return to work at TWA?

A Yes, I did.

Q When did you return to work at TWA?

A In July of 1966.

Q What position did you return to work at TWA at that time?

A At a ground position.

Q Would you have liked to have returned as a flight attendant?

A I certainly would have.

Q What was your ground position?

[177] A I was a slurry board operator, which consisted of the flight board and paging.

Q How long did you hold that job?

A Until 1972.

Q From 1966 until 1972, almost seven years?

A Yes.

Q How did you like that job?

A I hated it.

Q Other than hating the nature of the job, were there any other inconveniences or did it have any other effects upon your life?

A I had to work five days a week, which I didn't have to do as a flight attendant, and—

Q What difference did that make to you?

A It makes a big difference in the time I spend with my family.

Q Anything else?

A Also the pay. There was quite a difference in pay.

Q Was it less or more?

A It was much less. And the hours that I was away from home also made a big difference.

Q You say you worked in that ground position until 1972. What happened in 1972?

A I returned as a flight attendant. When the [178] mothers were reemployed I returned as a flight attendant.

Q When you became reemployed as a flight attendant in 1972, what was your seniority as a flight attendant?

A I had two years' seniority.

Q You mean despite the fact that you were with TWA for almost nine years you only had two years' seniority as a flight attendant?

A Yes, sir.

Q What difference did that seniority make to you at the time when you returned in 1972?

A It made a big difference. It made a difference in the flights that I could hold. I was flying three-day trips at that time.

It made a big difference in holding my vacation with my family in the summer, with my son. It made a big difference in the amount of the number of days that I worked.

Q O.K. I think the import of your testimony is clear, but just to make sure, you said it made a difference with respect to your family, the three-day trips. I assume you mean there was time you couldn't be with your family because of the three-day trips?

A Yes.

Q With respect to the vacations could you plan family vacations?

A There's no way, no. You could not.

[179] Q Were you required to spend holidays away from your family?

A I was, yes.

Q How many years of seniority did you lose as a result of the no-mother policy of TWA?

A I lost seven years.

MR. FORDE: I have no further questions, your Honor.

THE COURT: You may cross.

MR. HARTUNIAN: I have one.

DIRECT EXAMINATION

BY MR. HARTUNIAN:

Q Are you a member of the union now?

A Yes, I am.

MR. HARTUNIAN: Well, your Honor, it is going to be interesting to see Mr. Jolley cross examine his own client. I am not sure if it is ethical.

MR. JOLLEY: Your Honor, I will worry about the ethics of it. There have been many cases from the Supreme Court on down that recognize the fact that inherent in a collective bargaining relationship or seniority questions, which unfortunately cannot satisfy all members of the union, and in arbitration cases, we sometimes are asked to cross examine members of a union who are asked to testify for a company, and I am [180] prepared to cross examine this witness.

I don't think there is going to be anything in the nature of a conflict involved.

THE COURT: You may proceed.

MR. JOLLEY: I really only have one or two questions.

CROSS EXAMINATION

BY MR. JOLLEY:

Q When you became pregnant—strike that.

After you gave birth to your child you returned to employment with TWA on a ground position?

A Yes, I did.

Q Wasn't the—didn't the policy require you to terminate and resign your employment with TWA if you became a mother?

A We could—I asked for and was granted a maternity leave.

Q The no-motherhood policy didn't prevent mothers from coming back on ground jobs?

A It did not prevent mothers from coming back on ground jobs, no.

Q So during that time you continued to accrue company seniority, would that be right?

A I was supposed to, but I did not. That's a whole different ball game.

[181] Q You were supposed to?

A I was supposed to, yes.

MR. JOLLEY: I have no other questions.

MR. FORDE: I have nothing further, your Honor.

THE COURT: You may step down.

(Witness excused.)

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STIPULATION OF FACTS

[Filed in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

STIPULATION OF FACTS

The undersigned parties hereby stipulate to the following undisputed facts, these facts may be received into evidence by the Court as part of the record without the need for further testimony.

1. TWA did not hire males in the cabin attendant classification until sometime after 1970. The only flight attendant classification into which males were hired prior to 1972 was the purser classification. Any male employee appearing on Intervenor-Union Exhibit 1 having the present classification of cabin attendant and having a seniority date prior to 1972 was hired as a purser and, after 1970, changed to the cabin attendant classification. Included among TWA's present flight attendants are some male employees who were hired either as pursers or, after 1972, cabin attendants who, prior to their successful applications for employment were rejected by TWA for employment as cabin attendants for the express reason that TWA did not hire males as cabin attendants.

2. Of TWA's present black flight attendants, two were hired prior toJuly,1964 (the date of enactment of the Civil Rights Act of 1964).

3. Under TWA's "no-motherhood" policy which was in effect until approximately October, 1970, female flight

attendants were not permitted to work if they became mothers.

4. Only the most junior flight attendants at each domicile may be furloughed; in such case, the flight attendant about to be furloughed is permitted to transfer to another domicle where there are flight attendants junior to her, in which case those more junior flight attendants at the new domicile may be furloughed. If the flight attendant chooses to change residence to the new domicile, TWA does not pay the expenses of moving and relocation. If the flight attendant chooses not to move and commute instead, she is entitled only to the number of trip passes per year set forth in Union Exhibit 18, jump seat authority as provided in Article 7(D) of Union Exhibit 14, and reduced fares (of various amounts) on TWA and other carriers.

5. There are presently-employed flight attendants who presently have sufficient bidding seniority to bid and hold monthly flight schedules consisting of eight or nine "turnaround" (no overnight layovers) flight per month and who bid such schedules.

6. The Independent Federation of Flight Attendants is a labor organization, certified on April 1, 1977, by the National Mediation Board as the duly authorized representative of TWA's flight attendants. The Independent Federation of Flight Attendants was thus certified as the result of two contested elections against the prior representative of TWA's flight attendants, Transport Workers Union, Local No. 551. The current collective bargaining agreement (Intervenor-Union Exhibit 14) is the first collective bargaining agreement negotiated by the Independent Federation of Flight Attendants with TWA.

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/s/ William A. Jolley
WILLIAM A. JOLLEY, One of the
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INTERVENOR'S EXHIBIT NO. 6

[Admitted in Proceedings on October 3, 1979]

LIST OF NUMBER OF FLIGHT ATTENDANTS OF EACH TWA DOMICILE

DOMICILE	FEMALES	MALES	TOTAL
BOS-I	206	77	283
BOS-D	255	71	326
JFK-I	1,274	244	1,518
JFK-D	902	186	1,088
LAX-D	763	20	783
LAX-I	201	19	220
SFO-D	639	26	665
MCI-D	487	33	520
STL-D	497	112	609
ORD-D	612	133	745
ORD-I	170	36	206
TOTAL	6,006	957	6,963

INTERVENOR'S EXHIBIT NO. 8

[Admitted in Proceedings on October 3, 1979]

LIST OF NUMBER OF POTENTIAL RETURNING CLASS MEMBERS BY YEAR OF JOB SENIORITY

Year of Job Seniority	Potential Returning Class Members
1949	2
1950	0
1951	0
1952	1
1953	2
1954	0
1955	4
1956	3
1957	6
1958	8
1959	14
1960	30
1961	25
1962	55
1963	54
1964	66
1965	73
1966	56
1967	31
1968	13
1969	9
1970	4

INTERVENOR'S EXHIBIT NO. 9

[Admitted in Proceedings on October 3, 1979]

LIST OF NUMBER OF INCUMBENT FLIGHT ATTENDANTS BY YEAR OF JOB SENIORITY

YEAR	COUNT	YEAR	COUNT
1942	2	1943	0
1944	1	1945	3
1946	9	1947	9
1948	16	1949	9
1950	5	1951	13
1952	13	1953	16
1954	22	1955	28
1956	20	1957	29
1958	18	1959	30
1960	74	1961	58
1962	73	1963	112
1964	135	1965	275
1966	304	1967	314
1968	450	1969	545
1970	747	1971	304
1972	256	1973	415
1974	228	1975	444
1976	354	1977	721
1978	432	1979	546
TOTAL COUNT:	7,030		

INTERVENOR EXHIBIT NO. 14
[Admitted in Proceedings on October 3, 1979]

[TWA-IFFA COLLECTIVE BARGAINING AGREEMENT]

AGREEMENT

between

TRANS WORLD AIRLINES, INC.

and the

FLIGHT ATTENDANTS

in the service of

TRANS WORLD AIRLINES, INC.

as represented by

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

* * * *

ARTICLE 9

VACATIONS

* * * *

(C) An employee will become eligible for a vacation on January 1 of each year, provided he/she has completed the probationary period of six (6) months with the Company, whichever is less. A schedule of available vacation periods for the succeeding year shall be posted by the Company by October 1 each year; however, the Company may commence the January vacation bid period on January 2 in order to insure flight protection for the preceding day. Employees shall bid and be awarded a vacation period on the basis of their domicile as

of October 1. Preference of periods in which employees shall be permitted to take vacations shall be granted at each station in order of seniority, (including employees on a leave of absence) taking into consideration the requirements of the service. Employees shall file written preferences as to the period(s) for taking vacation, such preferences to be in the hands of the Company by November 15 each year. Vacation assignments shall be posted by the Company on or before December 1 and will remain posted through December 31. When vacation schedules have been established, senior employees will not be permitted to take the vacation period already assigned to junior employees. An employee's scheduled vacation period for the succeeding year shall not be changed because of a change in base station.

* * * *

ARTICLE 10

SENIORITY GENERAL

(A) Seniority shall begin to accrue from the date of employment as a Flight Attendant and shall continue to accrue during such period of employment as a Flight Attendant except as otherwise provided in this Agreement. When Flight Attendants have equal seniority, their relative seniority shall be determined on the basis of their length of employment with the Company, or if the length of their Company employment is equal then their surname shall be listed in order of age as determined by date of birth as shown in the Company's personnel records (the oldest of them being listed first, the next oldest second, etc.). As to those Flight Attendants who are assigned to the line on or after July 1, 1976, if

the length of Company employment is equal as between two Flight Attendants, then their surname shall be listed upon the senority list on the basis of the last four (4) digits of the Flight Attendants' social security number, with the Flight Attendant with the lowest last four (4) digits being deemed the senior.

(B) Seniority shall govern all employees in case of furlough due to reduction in forces, re-employment after furlough, (subject to Article 12(G)) choice of vacancies, and preference of assignment to equipment, provided the employee is deemed sufficiently qualified by the Company for the operation involved, except that the term "sufficiently qualified" as used herein shall be applied the same as it was on July 31, 1969. In addition, qualifications or lack thereof on any equipment will not be used as a basis for denying seniority in cases of bidding or reduction in force. If a Flight Attendant bids and is awarded a line of time on equipment on which such Flight Attendant is not qualified, the provisions of Articles 6-A(F) or 6-B(G) will apply during such training. In the event a senior employee is not considered sufficiently qualified, the Company will, upon request, discuss the matter with the employee and furnish reasons therefor, in writing.

* * * *

ARTICLE 12

REDUCTION IN FORCE AND RECALL

(A) When Flight Attendants are to be furloughed due to a reduction in force at least fifteen (15) days notice of such reduction will be given the Flight Attendant to be laid off except that such notice will not be required in instances wherein a temporary

reduction is occasioned by strikes or other work stoppages, grounding of a substantial number of the Company's aircraft, or other circumstances beyond the Companys' control.

(B) In those instances requiring notification in (A) above, the Company will, prior to giving such notification, post a bulletin in all domiciles indicating the anticipated number of Flight Attendants to be furloughed by domicile and will offer an equivalent number of leaves of absence at those domiciles where the reduction will occur. The actual number and duration of such leaves to be granted at each domicile will be determined by the Company.

When Flight Attendants are furloughed due to a reduction in force the Flight Attendants with the least system seniority in the job classification at the domiciles where the reduction occurs will be given furlough notice as specified in (A) above. At the time of issuing said furlough notice, the Company will post a bulletin in all domiciles containing the following information:

1. Names of those Flight Attendants receiving furlough notices.
2. Locations where vacancies exist by classification.
3. The names, location and classification wherein the least senior Flight Attendants who are subject to displacement are based.

(The information required to be posted in accordance with the provisions of paragraph (B)3 above, will not be required when no further displacements will occur.)

Flight Attendants who have been issued furlough notice shall, within seven (7) days of such notice being issued, send a telegram to the Company speci-

fying their desire to accept the furlough or indicating those locations and classifications into which they will accept a transfer or displacement, in order of their preference. Telegram notifications shall be addressed to the Director, In-Flight Services Budgets And Controls, 605 Third Avenue, New York, New York 10016. Once having indicated their preferences for filling vacancies, displacement or furlough, Flight Attendants will not be permitted to refuse the award of said option. Exercise of displacement rights shall be as specified below and the Flight Attendant may only displace another Flight Attendant with less system seniority at a location specified in the above mentioned bulletin.

(1) When all telegram preferences have been received from Flight Attendants who have been issued furlough notice the Company shall award vacancies or displacement in system seniority order.

(2) Flight Attendants who are furloughed due to a reduction in force or who have been displaced may elect any of the options set forth below for his/her respective classification:

INTERNATIONAL SERVICE MANAGER:

1. Bid any International Service Manager vacancy on the system.
2. Displace the most junior International Service Manager on the system.
3. Displace the most junior Purser at the same domicile.
4. Displace the most junior Purser on the system.
5. Displace the most junior International Cabin Attendant at the same domicile.

6. Displace the most junior International Cabin Attendant on the system.
7. Displace the most junior Domestic Cabin Attendant at the same location.
8. Displace the most junior Domestic Cabin Attendant on the system.
9. Furlough.

DOMESTIC SERVICE MANAGER:

1. Did any Domestic Service Manager vacancy on the system.
2. Displace the most junior Domestic Service Manager on the system.
3. Displace the most junior Domestic Cabin Attendant at the same domicile.
4. Displace the most junior Domestic Cabin Attendant on the system.
5. Furlough.

FLIGHT PURSER:

1. Bid any Purser vacancy on the system.
2. Displace the most junior Purser on the System.
3. Displace the most junior International Cabin Attendant at the same domicile.
4. Displace the most junior International Cabin Attendant on the system.
5. Displace the most junior Domestic Cabin Attendant at the same location.
6. Displace the most junior Domestic Cabin Attendant on the system.
7. Furlough.

INTERNATIONAL CABIN ATTENDANTS:

1. Bid any Cabin Attendant vacancy on the system.
2. Displace the most junior International Cabin Attendant on the system.
3. Displace the most junior Domestic Cabin Attendant at the same location.
4. Displace the most junior Domestic Cabin Attendant on the system.
5. Furlough.

DOMESTIC CABIN ATTENDANTS:

1. Bid any Cabin Attendant vacancy on the system.
2. Displace the most junior Cabin Attendant on the system.
3. Furlough.

(C) Changes in base station as a result of exercising displacement options shall be without expense to the Company but non-positive air transportation on the Company's system shall be furnished to the extent permitted by law and in accordance with Company regulations. Flight Attendants who are displacing will exercise their system seniority in the Flight Attendant position for purposes of vacation, rates of pay, sick leave and bidding provisions of this agreement.

(D) An employee who has been furloughed due to a reduction in force shall file his/her address with the Company's Industrial Relations Department and thereafter shall promptly advise the Company of any change in address.

(E) An employee on furlough shall not be entitled to preference in re-employment and his/her name shall be removed from the seniority list if he/she does not comply with the requirement of paragraph (D) of this Article, or if he/she does not notify the Company in writing or by telegraphing of his/her intention to return to the service within fifteen (15) days of sending notice offering re-employment; or if he/she does not return to the service of the Company on or before the date specified in the notice offering such re-employment.

(F) Employees furloughed due to a reduction in force on return to duty within three (3) years from the furlough date, shall be allowed, for seniority purposes not for purposes of determining future pay rate, all time accrued prior to returning to duty. At the end of three (3) years after the date of furlough, the furlough shall expire and the employee's name shall be removed from the seniority list(s).

(G) Flight Attendants who have been furloughed or displaced or who have displaced into a lower classification will be recalled in seniority order to the classification from which furloughed or displaced prior to the processing of all other bids on file. Furloughed Flight Attendants shall, upon notice of recall, indicate in order of preference those domiciles to which they will accept assignment. Assignments to domiciles will then be made in seniority order from among those Flight Attendants being recalled and those Flight Attendants who have standing bids on file. The priority of recall of the classification(s) will apply only to the first available vacancy offered in the classification(s) to the furloughed or displaced employee.

* * * *

ARTICLE 13

FILLING OF VACANCIES

(A) Flight Attendants who desire to transfer to a difference base station or classifications may file a permanent bid in writing with the Company, stating the station(s) and/or classification(s) (listing them in order of preference, if more than one) to which they desire to transfer. However, employees will not be permitted to transfer until the completion of their probationary period. All bids must be filed with the Director—In-Flight Services, Budgets and Controls, 605 Third Avenue, New York, New York 10016. When vacancies occur in positions expected to last ninety (90) days or longer, the employees having the most system seniority, subject to the provisions of Article 12(G), who are qualified to perform the job and who have bids on file, will be offered an opportunity to transfer and fill the vacancy. Any employee transferring to fill such vacancy shall be available to begin the assignment on the date set by the Company, which shall be not less than seven (7) days from the date notified of the assignment. An employee shall be allowed a reasonable period between the time he/she is relieved of duties and the time required to report at the new location. Such time shall be established in advance and shall be dependent upon the means of travel. Before a bid is accepted for International Operations, a Flight Attendant must show proof of ability to secure a passport within a thirty (30) day period.

(B) If no bids are on file at the time the vacancy occurs, special bids may be requested for filling the vacancy. If no qualified employee expresses a desire to transfer, the vacancy may be filled by as-

signing the most junior qualified employee to the position, or, in the Company's discretion, by hiring a new employee. When special bids are requested, the bulletin will state the numbers of vacancies to be filled, the base station of each vacancy, and a reasonable deadline date after which bids will not be considered, which date will not be less than ten (10) days after the date the bulletin is posted. Bids under this paragraph must be made by telegram addressed to the appropriate Company official named in (A) of this Article.

(C) Employees involuntarily assigned pursuant to paragraph (B) above shall have prior rights to displacement in lieu of the most junior employees at the station where the displacement occurs. Such employee shall have the prerogative of returning to the base station from which the involuntary assignment was made.

* * * *

ARTICLE 18-A

SCHEDULING OF DOMESTIC FLIGHT ATTENDANTS

* * * *

(D)

* * * *

(3) Preparation of Bid Runs

(a) The scheduling of Flight Attendants out of each base station shall be in accordance with seniority and the provisions of the Agreement. Since all situations cannot be covered, any question of interpretation should be brought to the attention of the General Manager, In-Flight Services of the respective base station. If such interpretation is not satisfactory to

the Flight Attendant involved, he/she shall nevertheless follow instructions received from the General Manager, In-Flight Services of the respective base station without prejudice to the Flight Attendant's rights under Article 16 of the Agreement.

(b) In each category at each base station, bid runs shall be posted and bid in accordance with this Article. The minimum number of relief runs anticipated shall be indicated in the bid package. Relief bids will be constructed after completion of initial balancing and shall be construed to be bid runs.

• • • •

(5) Awarding Of Run Selections

(a) Run selections shall be awarded in accordance with seniority and posted. Every effort shall be made to post the run selection awards within forty-eight (48) hours after the time and date of the closing of bid preferences.

Flight Attendants may call Crew Schedule during specified hours for bid results. Those specified hours will be indicated on the cover letter of the bid package.

If the bid results are not posted forty-eight (48) hours prior to the beginning of the new bid period, Flight attendants may call Crew Schedule other than the specified times indicated on the cover letter for results.

At each domicile for each classification, copies of the alphabetical listing of monthly bid awards will be available for use by Flight Attendants.

• • • •

LETTER No. II

* * * *

Vacancies in the Service Manager classifications on International shall be open for bid on a systemwide basis by employees who have served as a Flight Purser for one (1) year or more. Employees presently on the Flight Attendant System Seniority List shall not be retested for language proficiency. Vacancies in the Service Manager classification on the domestic operation shall be opened for bid on a system wide basis by Flight Attendants who have served as a Flight Attendant for three (3) years or more.

Successful bidders to the Service Manager position on International shall be filed by Flight Pursers in accordance with the accrued seniority as Flight Attendants, provided the bidder meets current flight attendant weight and appearance standards. Successful bidders to the Service Manager position on Domestic shall be filled by Flight Attendants in accordance with the accrued Flight Attendant seniority provided the bidder meets current Flight Attendant weight and appearance standards.

* * * *

INTERVENOR'S EXHIBIT NO. 17

[Admitted in Procedings on October 3, 1979]

[CHART OF PAY DIFFERENTIALS]

EFFECTIVE OCTOBER 1, 1979

COMPARISON 75 HOUR PAY YIELD CABIN ATTENDANT

Length of Service	(75) Domestic	(75) International	Difference Per Month	Total Difference in 1 Year
1st 6 months	$1019.20	$1204.00	$184.80	$2217.60
2nd 6 months	1072.20	1261.70	189.50	2274.00
2nd year	1146.30	1340.50	194.20	2330.40
3rd year	1205.20	1439.40	234.20	2810.40
4th year	1391.10	1520.60	129.50	1554.00
5th year	1440.10	1597.10	153.00	1836.00
6th year	1475.90	1640.60	164.70	1976.40
7th year	1531.20	1679.50	148.30	1779.60
8th year	1571.20	1690.10	118.90	1426.80
9th year	1608.90	1733.60	124.70	1496.40
10th year	1641.80	1768.90	127.10	1525.20
11th year	1674.80	1803.00	128.20	1538.40
12th year	1711.20	1845.40	134.20	1610.40

EFFECTIVE OCTOBER 1, 1979

COMPARISON 75 HOUR PAY YIELD DOMESTIC CABIN ATTENDANT *

COMPARISON 85 HOUR PAY YIELD INTERNATIONAL CABIN ATTENDANT **

Length of Service	(75) Domestic	(85) International	Difference Per Month	Total Difference in 1 Year
1st 6 months	$1019.20	$1385.00	$365.80	$4389.60
2nd 6 months	1072.20	1451.40	379.20	4550.40
2nd year	1146.30	1542.00	395.70	4748.40
3rd year	1205.20	1655.80	450.60	5407.20
4th year	1391.10	1749.20	358.10	4297.20
5th year	1444.10	1837.20	393.10	4717.20
6th year	1475.90	1887.20	411.30	4935.60
7th year	1531.20	1932.00	400.80	4809.60
8th year	1571.20	1944.20	373.00	4476.00
9th year	1608.90	1994.20	385.30	4623.60
10th year	1641.80	2034.80	393.00	4716.00
11th year	1674.80	2074.00	399.20	4790.40
12th year	1711.20	2122.80	411.60	4939.20

* Domestic cabin attendant pay yield=75 hours

** International cabin attendant pay yield=85 hours

(as per collective bargaining agreement, page 272)

INTERVENOR'S EXHIBIT NO. 20(a)
[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF JUDY JENKINS ANDERSON

State of Illinois)
) ss
County of Cook)

Judy Jenkins Anderson, first being duly sworn, on her oath states:

1. I have been flying for Trans World Airlines, Inc. since April 22, 1966. I am presently flying international flights out of Los Angeles.

2. I just recently have been able to hold a line flying international and am at the borderline between scheduleholder and reserve. TWA's schedule of flights out of Los Angeles International for November, 1979, will leave me only four numbers from being excessed out of the domicile at that time. If enough mothers return and come into my domicile, I will definitely be bumped to reserve. This will produce a hardship because when I fly reserve my schedule is much more erratic. This certainly affects my family life.

3. It is also quite possible that I could be bumped out of international flights and then I would be flying domestic. This would drastically affect my income—as much as $400 to $500 a month. Also, I live in San Diego and commute to Los Angeles. If bumped to domestic it will

mean five to seven more flights a month and this means that I have to commute to the airport more often.

4. Another alternative for me if I was bumped out of Los Angeles International would be to continue flying International, which I would prefer to do, by transferring to Chicago International, Boston International, and New York International; but this would cost me a great deal of financial loss in commuting expenses.

/s/ Judy Jenkins Anderson
JUDY JENKINS ANDERSON

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20(b)
[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF SERGIO BACHURETZ

State of Illinois)
) ss
County of Cook)

Sergio Bachuretz, first being duly sworn, on his oath states:

1. I am presently employed by Trans World Airlines, Inc. as a domestic reserve flight attendant assigned to the Los Angeles domicile. I am approximately four (4) from the bottom in seniority at this domicile. I began flying for TWA on or about May 31, 1975.

2. My parents are not originally from this country and can barely speak English. Because of this, I have always had to assist them in managing their affairs, especially in regard to any matters relating to medical or legal problems, banks, insurance companies, and the like. I have always had to be by their side so I could translate for them. On one occasion, Social Security needed to meet with them and wrote to my parents that they should bring their son so I could interpret for them. In addition to this, my parents are in poor health and depend upon me and require my presence to assist them in many situations.

3. In addition, I plan to attend school between September-February, 1979 to complete my education. I have

saved just enough money so that I can take a leave from TWA in order to complete my schooling.

4. If the mothers are returned with competitive seniority, I will in all likelihood be forced to leave the Los Angeles domicile. My forced relocation would prove devastating to my parents. Because of their inability to speak English, they would be left alone and unable to manage their daily affairs. Moreover, I would be forced to leave school because of the increased expenses in relocating.

/s/ Sergio Bachuretz
SERGIO BACHURETZ

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20(c)
[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF MARIA BERGER

Maria Berger, first being duly sworn, on her oath states:

1. I applied for a flight attendant position with TWA in 1969 and 1970, while TWA's no-motherhood policy was in effect. At that time I had a child, who was born in 1963, and I was not hired until 1972.

2. I have been with the Company since June 13, 1972. I presently have enough seniority to fly international. However, if a few people come in with more seniority rights I could easily be bumped to domestic. This could drastically affect my income because I am language qualified, and I get additional money for my international flights. If I am bumped to domestic I could lose approximately $500 a month.

3. I am presently studying both French and Italian so that I can take the language test in each language this Fall. If I pass the test then I will be language qualified for even more international flights and this will increase my income. If I am bumped to domestic all my efforts in studying these languages will be a waste because I will not be able to use them on my job.

4. I need to fly international. I am the sole support for my sixteen year old daughter. I am now preparing to send her to college. I also own my home and my mortgage payments are based upon my anticipated income

flying international. It is conceivable that if bumped, I would not only be flying domestic, but I might have to relocate. I would be forced into selling my home and pulling my daughter out of her high school.

5. I am domiciled in New York International. At the present time, I am holding a schedule but my seniority is right on the borderline between schedule-holder and reserve.

6. If members of the class return to New York International with more seniority than me, there is a likelihood that I will be placed on reserve. This will interfere with my home life and my daughter's life. In addition, I am presently under medical treatment for an industrial back injury and I will not be able to schedule medical treatment if I am on reserve.

/s/ Maria Berger
MARIA BERGER

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 16

[Admitted in Proceedings on October 3, 1979]

COMPETITIVE AND NON-COMPETITIVE SENIORITY PROVISIONS IN COLLECTIVE BARGAINING AGREEMENT AND FLIGHT SERVICE MANUAL

1) First access to rooms at specific overseas hotels	4(B)(1)(b)
2) Equipment Substitutions 6-A(X)(5)(a); 6-A(X)(6)(a) 6-B(U)(5)(a); 6-B(U)(6)(a)	 FSM 04.22.04 C 1.b.(2)(a)
3) Jumpseat Authority—access to pax seat if arrival of F/A's are same time	7(D)
4) Vacation bidding	9(C)
5) -furlough -re-employment after furlough -choice of vacancies -preference of assignment to equipment	10(B); 12(B) 10(B); 12(F) 10(B) 10(B)
6) Displacement	12(B)
7) Recall -choice of domicile when recalled (also includes standing bids on file)	12(G)
8) Transfer to different base station or job classification	13(A) FSM 4.25.02 D6
9) Employees involuntarily assigned to fill vacancies where no bids are on file	13(C)

10) Temporary Vacancies when insufficient bids are received	13(E)	
11) International operation employees to fill temporary vacancies in bases outside U.S.	13(E)	
12) Bidding on vacancy existing on the system when returning from leave of absence	15(D)	
	Domestic	International
13) Bidding for monthly flight assignment -open time lines -reserve call-in periods -reserve spreads	18-A(D) (5) (a) 18-A(D) (5) (j) 18-A(D) (8) (i) 18-A(D) (8) (l) (5)	18-B(D) (5) (a) 18-B(D) (5) (j)
14) Bidding working positions on airplane	FSM 3.05.02 (on line seniority date)	
15) Promotion to higher paying classification (Purser to SM—Letter #2 pg. 250)		
16) Priority for access/upgrade to F/C when DHDing on Class B positive space	FSM 4.25.18 H7	
NON-COMPETITIVE	ARTICLE	
Pay Scale Progression	3	
Pass allotment (term pass, etc.)	7	
Vacation Days	9	
Retirement Benefits	21	

INTERVENOR'S EXHIBIT NO. 20(d)
[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF LINDA CORDEIRO

State of Illinois)
) ss
County of Cook)

Linda Cordeiro, first being duly sworn, on her oath states:

1. If the returning mothers are granted Union seniority, I will either be back on reserve or I will be out of a job. I began flying on May 11, 1978. I was on reserve and domiciled in Boston. Being on reserve produced a great deal of uncertainty in my life. Because of the haphazard schedule, I moved from Boston to New York so that I could hold a line. Now I realize that I might not even hold the job.

2. I recently graduated from college and I have $10,000 worth of college debts. I am newly married and my husband and I are buying a house on Long Island. We are able to do this because I do have a good job. However, if I am out of work, we might not be able to buy the house and my college debts would have to wait.

/s/ Linda Cordeiro
LINDA CORDEIRO

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20(e)
[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF LAWANDA CURRY

State of Illinois)
) ss
County of Cook)

Lawanda Curry, first being duly sworn, on her oath states:

1. I am presently employed by Trans World Airlines, Inc. as a domestic reserve flight attended assigned to the Los Angeles domicile. As of this date, I am approximately twenty (20) from the bottom in seniority at this domicile. I began flying with TWA on or about November 15, 1974. As a flight attendant, my present income is approximately $1,300 per month.

2. My husband and I are presently looking for a new house in the Los Angeles area. Our ability to be able to afford a new house is based upon our joint incomes.

3. If the returning mothers were reinstated with full competitive seniority there is a very good possibility that I would either be furloughed or displaced from the Los Angeles domicile because of my low seniority. My being furloughed would definitely have a severe impact upon our finances and would definitely preclude our being able to purchase a new home.

4. My being displaced from this domicile and forced to relocate elsewhere within the system would also cause undue hardship. My husband is an engineer with NASA (jet propulsion laboratory) and cannot relocate else-

where in the country. Even if other engineering jobs were available, the nature of his government clearance and the projects upon which he works at this time would preclude his accepting other employment at this time. Unless my husband is prepared to give up his job and change fields, something which we cannot afford to do, my relocation would require our being separated for a long period of time. The necessary costs involved in moving, finding an apartment, setting up "housekeeping" and commuting back to Los Angeles are extremely high. It is doubtful that we would be able to afford these additional expenses at this time.

5. In addition, in September, 1976 I sustained an industrial injury (broken back). I was on medical leave until July, 1977. I am still under my doctor's care in Los Angeles because of the recurrent nature of the injury and possible problems that may develop. If I were forced to relocate elsewhere in the country, I would have to commute to Los Angeles in order to remain under my doctor's care and treatment. This additional expense would also cause a financial hardship.

6. I contribute $100.00 for support each month to my mother. If I am furloughed, I will be unable to continue this support.

7. On September 30, 1979, I was advised by TWA's Los Angeles Crew Coordinator, Dave England, that the number of Los Angeles International flight attendants would be reduced in November and that many of those excess International flight attendants would bump into Los Angeles domestic. These international flight attendands will have more seniority than I and will push me closer to the bottom in Los Angeles domestic. The return of class members into Los Angeles domestic could then well push me out of the domicile altogether.

/s/ Lawanda Curry
LAWANDA CURRY

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20(f)
[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF SHEILA GARTNER

Sheila Gartner, first being duly sworn, on her oath states:

1. I began flying with Trans World Airlines, Inc. on January 20, 1967. The policy that forced termination if a flight attendant became pregnant effected my decision to get married and to have a family. I have now been married for six years and my husband and I want a family. We have been attempting to have children for three years, and the doctor says that my age (I am almost 33) has been a factor in the difficulty I have had in becoming pregnant.

2. My flight schedule has been a factor in my decision to have a family. With more seniority (I am one of the most 20 senior reserves) I am closer to holding a line, which produces predictability in my flight schedule. If I hold a line soon, I will be able to combine family and job. However, if I stay on reserve, which will most certainly happen if the returning mothers are allowed to outbid me, I will have to quit my job when I become pregnant.

3. Also, I now fly international out of Los Angeles. However, if returning mothers come back, I will probably by flying domestic out of Los Angeles because I am only twenty from the botton in seniority on international. This will increase my number of flights a month. This

would be a serious hardship because I live two hours from the airport and increased trips means a lot more work time a month for me. All of this would make it impossible for me to keep my job with TWA and have a family.

/s/ Sheila Gartner
SHEILA GARTNER

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20(h)
[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF BETH JOHNSTONE

State of Illinois)
) ss
County of Cook)

Beth Johnstone, first being duly sworn, on her oath states:

1. I began flying with Trans World Airlines, Inc on December 26, 1978. I am now domiciled in Chicago.

2. I now have two preschool children, but one reason that my husband and I waited as long as we did to have our children was because I wanted to accrue enough seniority to make it feasible to raise a family and continue working.

3. Because of my small children I prefer to fly turnaround flights. Then I can be with my children more days during the month and I do not have to be away nights. However, even with my high seniority number (I am number 65 in Chicago) I cannot always successfully bid for turnarounds. If the few returning mothers have more seniority than I do, I will have to fly two or three day trips.

4. My husband is a policeman and his schedule is quite erratic. If I have to fly more days a month and many of the trips are overnighters, we will have serious child care problems.

/s/ Beth Johnstone
BETH JOHNSTONE

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20(i)
[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF KAREN KNUDSEN

State of Illinois)
) ss
County of Cook)

Karen Knudsen, first being duly sworn, on her oath states:

1. I have been flying with Trans World Airlines, Inc. since November 25, 1966. I am flying international out of Los Angeles, and I am language qualified, which allows me extra pay as long as I am on International.

2. If returning mothers are given Union seniority and some of them are domiciled at Los Angeles international, I will be seriously affected. I would most certainly be bumped from Los Angeles international and since I am inclined to fly international I would attempt to transfer to another domicile. This would mean that I would be at a more junior domicile, probably on the East coast. Since I live in Los Angeles I would be forced to commute to the East coast for my trips. Obviously this would seriously affect the number of hours I must work. However, if I do not attempt to fly international, my salary will be seriously affected.

3. It is possible that if there are enough returning mothers at the other international domiciles, I will not be able to bid international and then I will be bumped

to Los Angeles domestic. This means that I will have to fly 14 to 15 days a month instead of the 9 I fly now. It also means a serious financial loss. My monthly salary will decrease by $400 to $500 a month if I fly domestic and am unable to utilize my language skill.

4. Whether I fly domestic or international out of another domicile, my family life will be affected. My husband and I have a small child and I would like to minimize my flight time. This will be impossible if I am commuting to the East coast to fly international or flying more days from Los Angeles domestic.

5. In November, 1970, Los Angeles International scheduling will require 35 fewer flight attendants than at present. This will place me only two numbers from being excessed or bumped out of the domicile. The return of two or more class members could then force me out of the domicile.

/s/ Karen Knudsen
KAREN KNUDSEN

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20(j)
[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF PAM LLOYD

State of Illinois)
) ss
County of Cook)

Pam Lloyd, first being duly sworn, on her oath states:

1. I began flying with Trans World Airlines, Inc. on June 20, 1970. I am now domiciled in New York and flying domestic. I also am a flight service manager. My duties consist of being a non-supervisory coordinator of cabin attendants on the trips I fly.

2. If the returning mothers are given Union seniority, they will be able to outbid me for my position as flight service manager because this is a bid job.

3. In the past six months, there have been two reductions in the number of Domestic Service Managers in New York. If plaintiff class members return with sufficient seniority to hold Service Manager positions, an excess in these positions could occur, and other Domestic Service Managers and myself could be bumped to cabin attendant positions with resultant loss in pay. For a person with my seniority, the loss of pay would be approximately $300.00 a month, based upon the yield chart in the collective bargaining agreement.

4. I have also a real estate license and I sell real estate on the weekends. Consequently, I need to be able to bid

trips that allow me to have weekends off. It is difficult to hold these lines. With a few more people in the domicile bidding for the more desirable trips, I will have to fly weekends and this will force me to give up my real estate business.

5. I have recently purchased some property and intend to build a home on it. If my income is reduced because I am unable to hold my flight service manager position and because I have to give up my real estate business, I will not be able to build that home in the foreseeable future.

/s/ Pam Lloyd
PAM LLOYD

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20 (k)

[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF CAROLINA MARSHALL

Carolina Marshall, first being duly sworn, on her oath states:

1. I have been a flight attendant with Trans World Airlines, Inc. since February 23, 1978. I was a nurse with the Navy, but I gave up that job because I wanted to fly. When I left the Navy I was earning approximately $24,000 per year.

2. When I was hired by TWA, I was also offered a position with four other airlines. Because it looked like I would be able to fly international if I went with TWA, I refused the jobs that were offered by the other airlines.

3. I am domiciled in Chicago and now am flying international during the summer months and domestic during the winter months. I am five from the bottom in seniority on international, and if any returning mothers come into the domicile and bid for international flights I will most certainly be bumped to domestic during the entire year. I will probably not be able to fly international for three or four years.

4. Not only do I prefer flying international, but it is an economic necessity that I do so. I recently purchased a condominium. If I am unable to fly any international flights my income could be affected by as much as $3,500 a year and I might be forced to give up my condominium.

/s/ Carolina Marshall
CAROLINA MARSHALL

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20(l)

[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF BARBARA McWALTER

Barbara McWalter, first being duly sworn, on her oath states:

1. I began flying with Trans World Airlines, Inc. on July 30, 1965. I now have a small child, and my husband and I are considering having a second. If the returning mothers are given union seniority my family life could be seriously affected because many of the returning mothers will have seniority rights superior to mine.

2. Right now I bid for turnaround flights. This makes it possible for me to fly 9 to 11 days a month and each flight is a turnaround; therefore, I am home in the evening with my pre-school child. It is quite difficult to get turnaround flights, and my years of seniority now make it possible for me to fly them. Flight attendants with children actively seek these turnaround flights and seniority determines which of those bidding are awarded these flights. Assuming that returning mothers bid for these flights, I will be flying 14 to 16 days a month and many of those flights would be overnight. Consequently, I could not be home with my daughter. If I go ahead with my plans for a second child and I cannot bid enough turnarounds, I could be forced to request a leave of absence which I may or may not get so that I could be home with the new child during the evening.

/s/ Barbara McWalter
BARBARA McWALTER

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20(m)

[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF PAM NAPOLITAN

Pam Napolitan, first being duly sworn, on her oath states:

1. I began flying for Trans World Airlines, Inc. on May 14, 1965. In 1970 I married and in 1975 our baby girl was born. I waited to have a child until my seniority gave me bidding rights that made my schedule more flexible. Right now I bid turnaround jobs; this allows me to work about 9 days a month and I have practically no overnight trips. This kind of a schedule is crucial for me because my child has serious medical problems. She has brain damage and she is subject to epileptic seizures. My husband or I must be with her at all times, and, so far we have been able to get work schedules that allow one of us to always be in town and with our daughter. If the returning mothers are given union seniority, then my seniority number will probably double from no. 24 to no. 48. I will probably have to fly 16 days a month and many of the trips will be overnighters. This will make our child care problem an impossible task, and it is foreseeable that I will have to quit my job. If I have to quit flying to enable myself to stay home with my daughter, it will seriously affect my family's standard of living. I am certain we would have to sell our home.

2. I feel I am entitled to my seniority number. I have worked fourteen years for it, I did not violate the rights of the returning mothers and I am being asked to pay for this past wrong.

/s/ Pam Napolitan
PAM NAPOLITAN

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20(o)
[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF LOUISE SHIPMAN

County of Cook)
) ss
State of Illinois)

Louise Shipman, first being duly sworn, on her oath states:

1. I have been flying with Trans World Airlines, Inc. since November 8, 1974. I am now stationed in Los Angeles, and I am flying domestic reserve.

2. I used to fly with Air Canada, but in 1974 I married an American and moved to the United States. I applied with TWA because it had a more significant possibility of providing me with a domicile on the West coast. My husband was living in Los Angeles and I wanted to be domiciled there.

3. It was four years before I had enough seniority to transfer to Los Angeles. I was domiciled in Kansas City for 3 years and then San Francisco for a year. All of this time I had to commute to Los Angeles once a month to see my husband, whose job prevented him from relocating to be with me.

4. I am finally living in Los Angeles, but if the returning mothers are given Union seniority I could very possibly be bumped from Los Angeles and again sepa-

rated from my husband. I am only 17 from the bottom in seniority so relocation is a real possibility for me.

5. If not forced to relocate, I will most certainly be on reserve status much longer. My husband and I would like to have children but we have been waiting to start our family until I can hold a line and therefore have a reasonable flight schedule. I am now 28 and my husband is 36 and we do not want to have to wait many more years to have children.

/s/ Louise Shipman
LOUISE SHIPMAN

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20(p)
[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF MARSHA SMYSER

State of Illinois)
) ss
County of Cook)

Marsha Smyser, first being duly sworn, on her oath states:

1. When I started working for Trans World Airlines, Inc. on February 11, 1966, I decided not to have children because to do so would require me to give up my job. Economic considerations prevented me from trying to get pregnant.

2. I am now 34 years old, and I contribute to the support of my parents. I give them $279 a month. If returning mothers are given Union seniority, I will probably lose my schedule flying international out of Chicago. This will bump me to domestic and will have a decided impact on me financially. I will make about $300 less a month.

3. If the returning mothers are given Union seniority, it will affect me and others on the line not only economically but psychologically. There will be a big morale problem. I will feel very unhappy with a judicial system that allows women who have been able to stay home and raise their children to return with more benefits than me. I made a decision not to have children, and I have

been working hard for fourteen years. I made a personal sacrifice years ago when I decided not to have children, and now I am being asked to make a second personal sacrifice.

/s/ Marsha Smyser
MARSHA SMYSER

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20(q)
[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF PATRICIA SPIROS

State of Illinois)
) ss
County of Cook)

Patricia Spiros, first being duly sworn, on her oath states:

1. I am presently employed by Trans World Airlines, Inc. as a domestic reserve flight attendant assigned to the Los Angeles domicile. As of this date, I am approximately four (4) from the bottom in seniority at this domicile.

2. I began flying for TWA on or about June 7, 1975. Although my husband and son lived in Los Angeles at that time, I was initially assigned to the New York domicile. In an effort to avoid a separation from my family, I immediately filed a bid transfer to the Los Angeles domicile. I was finally transferred to Los Angeles almost three and one half (3½) years later. During that period of time, I had to take approximately eighteen (18) months leave in order to be with my husband and child.

3. I presently earn approximately $1,200 a month as a flight attendant. Because my husband is a school teacher, my income is and has always been absolutely es-

sential in order that we can maintain a decent standard of living.

4. If the returning mothers are granted full seniority, I will in all likelihood be furloughed and faced with the loss of my job because of my low seniority in this domicile. This would cause a severe financial hardship and seriously affect our standard of living. At the very least, I would be forced to transfer to another domicile. Because of the extreme difficulty in finding available teaching positions elsewhere, my husband would not be able to relocate and would be required to remain in the Los Angeles area. Thus, a forced displacement from Los Angeles and relocation would result in a second separation from my family. The expenses involved in establishing a second household in another domicile and the expenses of commuting in order that I be able to visit my family would cause a severe financial strain upon our limited income. Because of the prospect of a second expensive and lengthy separation and the impact this would have upon the stability and quality of our family life, especially for my young son (now eleven years old), it is foreseeable that I would have to quit my job if forced to transfer.

/s/ Patricia Spiros
PATRICIA SPIROS

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 20(s)
[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

AFFIDAVIT OF THOMAS WALTERS

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

Thomas Walters, first being duly sworn, on his oath states:

1. I am presently employed by Trans World Airlines, Inc as a domestic reserve flight attendant assigned to the Los Angeles domicile. I am approximately fifteen (15) from the botton in seniority at this domicile. I began flying for TWA on or about November 8, 1974. I earn approximately $1,300 a month as a flight attendant.

2. In addition to my position as a flight attendant with TWA, I am a licensed emergency medical technologist. My technologist's license and ability to practice is only good in the state of California. It is necessary that I maintain both jobs because both incomes are essential. I have recently purchased a home and the income from both jobs is necessary in order to cover the mortgage payments. Moreover, I am the legal guardian in this state of my two year old nephew. As a result of this responsibility, a portion of my earned income must go to meet his necessary child care and educational expenses.

3. In addition, my mother's physical condition requires that both my father and I spend a great deal of

time in attending to her various needs. No other family members are available and it is simply too great a responsibility for either one of us to bear alone.

4. If the mothers are to be returned with full bidding seniority there is a very real possibility that I will be "bumped" from the Los Angeles domicile and forced to relocate elsewhere if I wish to keep my job with TWA. If forced to relocate outside the state of California, I would not be able to continue my mork as a medical technologist. The loss of this income would cause a severe financial hardship in that (1) I would be unable to meet the mortgage payments of my new house, (2) my ability to meet those expenses necessary to provide for my nephew would be seriously jeopardized and (3) my family would in all likelihood be required to seek additional and expensive health care services to care for my mother.

/s/ Thomas K. Walters
THOMAS WALTERS

[Certification omitted in printing]

INTERVENOR'S EXHIBIT NO. 25

[Admitted in Proceedings on October 3, 1979]

[LIST OF MEMBERS OF SUB-CLASS A INTENDING TO RETURN TO WORK AND SENIORITY]

SENIORITY OF INDIVIDUALS WHO CLAIM TO BE IN SUB-CLASS A AND WHO INTEND TO RETURN TO WORK

Name and Company Payroll Number	On-Line Date	Last Day Worked	Periods Of Disability	Seniority (If Given Full Retroactive Credit)
1. Johnson, Patricia Anne 59171	03/10/61	04/22/70	1 yr. 6 mo.	16 yr. 11 mo.
2. Kopetz, Rita (Resesta) 73679	02/09/61	09/20/69	1 yr. 6 mo.	17 yr.
3. Zlatchin, Elizabeth (Kneale) 48723	05/16/63	08/01/70	9 mo.	15 yr. 5 mo.
4. Degheri Vickie Lynne (Kneale) 3116	05/05/67	09/30/69	1 yr. 6 mo.	10 yr. 9 mo.
5. Curcio, Mary Ann 37247	08/19/65	12/01/69	1 yr. 6 mo.	12 yr. 5 mo.
6. Cotter, Neva J. 65443	11/28/54	03/02/70	2 yr. 5 mo.	22 yr. 3 mo.
7. Collins, Janet (Huselton) 42627	12/29/62	03/09/70	1 yr. 7 mo.	15 yr.
8. Williams, Diane (Lafata) 9809	03/16/68	07/31/70	1 yr. 6 mo.	9 yr. 10 mo.
9. Mangan, Sherry Ann 1449	08/26/66	02/01/68	2 yr. 5 mo.	10 yr. 7 mo.

Name and Company Payroll Number	On-Line Date	Last Day Worked	Periods Of Disability	Seniority (If Given Full Retroactive Credit)
10. Wagner, Diane L. (McNeely) 22639	01/18/70	07/02/70	9 mo.	8 yr. 9 mo.
11. Friedman, Nancy Van Ness 91287	10/07/66	05/01/68	1 yr.	11 yr. 10 mo.
12. Albinak, Valerie Kellnor Smith 22831	01/25/70	05/18/71	1 yr. 6 mo.	8 yr.
13. Willour, Mary Lynn Sherman 15304	02/03/69	10/18/69	1 yr. 6 mo.	9 yr.
14. O'Callaghan, Martha Adilla (DeTrinidad) 29041	Unknown			
15. Hogrefe, Lynn M. 6825	12/03/67	04/30/70	1 yr. 7 mo.	10 yr. 1 mo.
16. Tichy, Edeltrand Maria (Kunz) 49959	04/04/64	10/15/69	1 yr. 6 mo.	13 yr. 10 mo.
17. Hansen, Marsha Kay Shira 14030	Unknown	09/03/69		
18. Jones, Dee Dolores 46277	07/09/65	10/01/69	1 yr. 8 mo.	12 yr. 5 mo.
19. Bach, Joanne Elizabeth 88727	06/13/64	02/21/70	1 yr. 6 mo.	13 yr. 8 mo.

Name and Company Payroll Number	On-Line Date	Last Day Worked	Periods Of Disability	Seniority (If Given Full Retroactive Credit)
20. Doonan, Anne E. (Donovan) 8650	01/28/68	04/01/70	1 yr. 6 mo.	10 yr.
21. Hall Janice Dodgson 22417	03/27/64	01/31/70	1 yr. 7 mo.	13 yr. 9 mo.
22. Grayson, Katherine D. 3565	12/27/65	07/01/70	9 mo.	12 yr. 10 mo.
23. Huntsberry, Janan Kay (Perkins) 02342	04/15/67	04/30/70	9 mo.	11 yr. 6 mo.
24. Hirt, Virginia Lee (Smith) 82663	12/01/62	09/01/69	1 yr. 6 mo.	15 yr. 2 mo.
25. Kerr, Linda Reed 25876	04/25/70	Unknown		
26. Kregel, Marilyn A. 43831	06/01/57	03/02/70	1 yr. 6 mo.	20 yr. 8 mo.
27. McCann, Nancy Jean (Rodenhausen) 75483	07/19/65	09/01/69	1 yr. 6 mo.	12 yr. 6 mo.
28. Newell, Susan (McGeary) 845	01/14/68	11/30/69	9 mo.	10 yr. 10 mo.
29. Rowe, Marcia I. 53505	01/17/65	07/17/69	9 mo.	13 yr. 9 mo.
30. Newton, Gwendolyn (Reynolds) 89919	02/09/64	03/31/66	9 mo.	14 yr. 9 mo.

Name and Company Payroll Number	On-Line Date	Last Day Worked	Periods Of Disability	Seniority (If Given Full Retroactive Credit)
31. Bennet, Ester Marie 1587	03/10/67	06/01/70	1 yr. 6 mo.	10 yr. 11 mo.
32. Vogelgesang, Joellen 46661	12/25/66	11/02/69	9 mo.	11 yr. 10 mo.
33. Plunkett, Carol Anne 5363	10/06/67	09/01/70	2 yr. 3 mo.	9 yr. 7 mo.
34. Langley, Janet L. 53059	11/04/66	03/01/71	1 yr. 10 mo.	10 yr. 11 mo.
35. Conrad, Carol Yvonne (Murphy) 63709	09/24/65	04/01/67	2 yr. 3 mo.	11 yr. 7 mo.

INTERVENOR'S EXHIBIT NO. 26

[Admitted in Proceedings on October 3, 1979]

[LIST OF MEMBERS OF SUB-CLASS A WHO HAVE BEEN REEMPLOYED AS FLIGHT ATENDANTS]

SENIORITYOF INDIVIDUALS WHO CLAIM TO BE MEMBERS OF SUB-CLASS A AND WHO HAVE BEEN RE-EMPLOYED AS FLIGHT ATTENDANTS

Eight individuals who claim to be members of Sub-Class A have been re-employed as flight attendants. By taking the amount of time between last day worked prior to termination due to motherhood and the date of re-employment, the amount of seniority that each of these individuals would gain if the court grants full retroactive seniority can be ascertained.

Name	Employee Number	Last Day Worked Prior To Termination Due To Motherhood	Date of Reemployment	Seniority Gain (If Given Full Retroactive Credit)
1. Sarmanian, Gail	71637	01/05/70	04/12/79	9 yrs. 3 mos.
2. Breznick, Jeannette Alicia	01897	Unknown		
3. Carlson, Katherine Joan (Powell)	70959	07/02/65	1972	approx. 6 yrs.
4. Yoder, Bonnie Marie (Oke)	66261	1969	1972	approx. 3 yrs.
5. Cain, Irene M.	92697	1969	1972	approx. 3 yrs.
6. Sutton, Joyce C. (Callan)	44541	05/31/69	1972	approx. 3 yrs.
7. Quinn, Cynthia Ann	42990	04/19/68	06/14/72	approx. 4 yrs.
8. Poynter, Barbara Diane	10759	Unknown		

PLAINTIFFS' EXHIBIT NO. 1 (AMENDED)

COMPARISON OF CURRENT FLIGHT ATTENDANTS * WITH POTENTIAL RETURNING MOTHERS FROM SUB-CLASS A

		Currently Employed	Potential Returning Class Members
BOSTON	(D)	326	2
BOSTON	(I)	283	0
N.Y.	(D)	1088	6
N.Y.	(I)	1518	0
L.A.	(D)	783	5
L.A.	(I)	220	1
K.C.		520	6
CHGO	(D)	745	6
CHGO	(I)	206	0
ST. L.		609	0
S.F.		665	7
		6963	33

* These data were gleaned from Union Exhibit 7.

PLAINTIFFS' EXHIBIT NO. 2 (AMENDED)

COMPARISON OF CURRENT FLIGHT ATTENDANTS * WITH POTENTIAL RETURNING MOTHERS FROM SUB-CLASS B

		Currently Employed	Potential Returning Class Members
BOSTON	(D)	326	7
BOSTON	(I)	283	0
N.Y.	(D)	1088	29**
N.Y.	(I)	1518	29
L.A.	(D)	783	31
L.A.	(I)	220	4
K.C.		520	15
CHGO	(D)	745	17
CHGO	(I)	206	3
ST. L.		609	7
S.F.		665	30
		6963	172

* Includes Pursers". These data were gleaned from Union Exhibit 7.

** Includes 7 who indicated Newark or Laguardia, and 1 who gave N.Y. as a second choice (having stated a nonexistent base as her first choice).

DEPOSITION OF DAVID J. CROMBIE

[Admitted in Proceedings on October 3, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

Deposition of DAVID J. CROMBIE, called for examination pursuant to notice and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions, taken before Donna M. Curran and Mary M. Gallagher, Certified Shorthand Reporters and Notaries Public within and for the County of DuPage and State of Illinois, at the offices of Coghlan, Joyce & Nellis, Room 4000, One North LaSalle Street, Chicago, Illinois, on Thursday, September 27, 1979, commencing at the hour of 3:00 o'clock p.m.

PRESENT:

MS. ANNE O'LAUGHLIN

MR. ARAM HARTUNIAN
MR. ARNOLD I. SHURE

MR. LAURENCE A. CARTON

MR. DOYLE R. PRYOR
MR. STEVEN A. FEHR

[2] DAVID J. CROMBIE,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PRYOR:

Q Would you state your full name for the record, please.

A David Crombie.

Q Mr. Crombie, do you work for Trans World Airlines?

A I do.

Q How long have you been employed by Trans World Airlines?

A Will be twenty years on February 1, 1980.

Q And in what capacity are you presently employed?

A I am a senior vice-president, administration.

Q And as senior vice-president, administration, what generally are your duties and responsibilities?

A Well, I supervise the personnel relations, the labor relations, and the properties and facilities functions.

Q And to whom do you report?

A The president, Mr. Meyer.

MR. SHURE: Mr. Crombie, I am having a little [3] trouble hearing you against the competition out there.

THE WITNESS: I will just talk louder.

BY MR. PRYOR:

Q How long have you been in your present position?

A Approximately four years.

Q And prior to that what was your title?

A Vice-president, industrial relations.

Q And how long did you hold that position?

A Since I joined the company.

Q So for nearly twenty years you have been involved in industrial relations on the management side?

A Yes.

Q Does your responsibility extend over the in-flight services department, with respect to labor relations?

A Yes, it does.

Q Is that the department which employs TWA's flight attendants?

A It is.

Q Are you familiar then with TWA's employment policies and practices with respect to flight attendants?

A I am.

Q Do you participate, or have you participated [4] in negotiations of collective bargaining contracts for TWA's flight attendants?

A I have.

Q Did you participate in the negotiation of the most recent flight attendant agreement which was signed October 11, 1978?

A I did.

Q In your position do you have responsibility for administering collective bargaining contracts with the flight attendants?

A I do.

Q Does TWA maintain a manual entitled The In Flight Services Manual?

A I believe it does.

Q Do you know what the In Flight Services Manual is?

A Generally, yes. My knowledge of its specifics are very limited.

Q Do you know if it is a compilation of TWA's policies and procedures for the duties and responsibilities of flight attendants?

A I think that is a reasonably accurate description of it.

Q Is it updated from time to time?

[5] A I believe it is.

Q Does TWA maintain a Management Polices and Procedures Manual?

A It does.

Q What is that?

A That is well described by its title. It is a statement of corporate policies and procedures relating to all employees with respect to a variety of matters, including payroll and personnel matters, with respect to levels of authority, who can pay out the company's funds. There is a whole series of procedures and policies included.

MR. HARTUNIAN: Excuse me, what was the name of that manual again?

MR. PRYOR: Management Polices and Procedures Manual—is that correct?

THE WITNESS: Yes.

MR. PRYOR: Or the MP&P Manual.

THE WITNESS: MP&P Manual.

BY MR. PRYOR:

Q When we refer to flight attendants at TWA, the term "flight attendants" really includes several job classifications, does it not?

A Yes.

[6] Q Does it include cabin attendants?

A It includes flight attendants, includes pursers, and it includes service managers.

Whether other than pursers and service managers are called cabin attendants in the agreement escapes me at the moment. If they are called cabin attendants, they are cabin attendants.

Q I think the agreement refers to cabin attendants, to flight pursers and to service managers.

A Those are the three categories.

Q But the term flight attendant itself is a more inclusive—it includes all three of those classifications, is that right?

A That is correct.

Q Can you tell us just briefly what the difference between a cabin attendant and a purser is?

A Well, first of all, a purser is a flight attendant employed exclusively on international flights. A purser may be a male or a female. A purser must have certain language qualifications which are not required of a cabin attendant. A purser has certain recordkeeping, administrative and supervisory duties in flight that the cabin attendant does not have.

Q Pursers are paid more than cabin attendants, [7] are they not?

A They are.

Q And can you tell me what the difference is between a cabin attendant and a service manager?

A A service manager may be either a male or a female flight attendant, may be employed on both services, both international and domestic, is always employed on wide body aircraft, and when so employed has a kind of a lead man or lead person coordinating function. The service manager is expected to perform certain routine flight attendant duties or cabin attendant duties, and in addition has certain coordinating functions to ensure the smooth carrying out of the service specifications.

Q Would you agree that the classifications in ascending order of pay and responsibility start with cabin attendant at the lowest, and then pursers and then service managers?

A I haven't looked at the pay scale recently, but I would not dispute that.

The question of responsibility, I really don't know. Pay, certainly, and the whole question of what kind of responsibility a purser has, as you may well realize, is a subject of a court case which has a [8] long history.

Q O.K.

A Which I would not wish to go into at great length.

Q Is it true that TWA did not hire males as cabin attendants before the passage of the 1964 Civil Rights Act?

A TWA did not employ males in a position other than purser prior to the passage of that Act.

Q As flight attendants, you mean?

A Right. They did not employ people to work in airplanes as flight attendants in positions other than purser, prior to that Act.

Q Do you know when TWA hired males for the first time as cabin attendants?

A I don't.

Q Was it after 1970?

A If I had to guess, I would guess that it was.

Q Did TWA ever have a policy or practice of not hiring black persons as flight attendants?

A To my knowledge, no.

Q If you know, how many blacks were hired by TWA as flight attendants, before the enactment of the 1964 Civil Rights Act?

[9] A I don't know.

Q Is it accurate to say that until after the Civil Rights Act became law, that TWA did not hire black persons as flight attendants in numbers that were substantially proportional to their existence in the general populations?

A I think that is a reasonable statement.

Q Did TWA ever adopt an affirmative action program relating to the hiring or employment of black persons as flight attendants?

A Yes.

Q Do you know when that affirmative action plan was adopted?

A Sometime after 1970. Probably in the time frame 1970 to '73, somewhere in that area.

Q Was that affirmative action plan adopted pursuant to an order of any government agency or court?

A No. The only affirmative action program that we have undertaken pursuant to such order related to employment in the City of San Francisco, but we have had no affirmative action program mandated for system-wide application to any classification or to all classifications, other than that San Francisco mandate.

Q What was this order that you are referring to [10] in San Francisco?

A Well, in San Francisco we were sued, and I think the EEOC took up the charge.

Q Was it a charge of racial discrimination?

A Yes.

Q In flight attendant categories?

A No, in San Francisco.

Q In all categories in San Francisco?

A Yes. There was a group of San Francisco employees who associated together as the Black Caucus, and I think they persuaded the Equal Employment Opportunity Commission that there was sufficient ground for that Commission to sue us on the basis that we were not carrying on our obligations to blacks.

Q To your knowledge were any of the allegations in that lawsuit charging that TWA did not employ blacks or discriminated against blacks in flight attendant employment?

A No, I don't believe so. I don't believe so.

Q You referred to an order that was entered in that proceeding. What was the nature of that order?

A What happened was that our attorneys and the EEOC negotiated an agreement which involved certain hiring and upgrading goals relating to minorities in [11] San Francisco, and that agreement—and I am a non-lawyer—was reviewed by the federal court, approved by the federal court, and indeed we are still operating under that order, or that agreement, or whatever you call it.

[12] Q Do you know if the Court in that proceeding made any findings as to whether TWA practiced discrimination against black persons in employment?

A My recollection is that there were no findings by the Court.

(Whereupon Mr. Fehr left the deposition hearing room, and the taking of the deposition proceeded as follows:)

BY MR. PRYOR:

Q Did there come a time when TWA began hiring substantially more black persons than it had previously hired as flight attendants?

A Yes, I believe I addressed myself to that earlier. Sometime in the time frame '70 to '73, greater numbers

of blacks and other minorities were hired. Indeed, I am advised that in the last class we put into training—last group of classes, that we hired about 20 percent minorities—minorities including males in this case—males, blacks, Spanish-speaking persons, American Indians.

Q Are you aware of any findings by any governmental agencies or by any courts of racial discrimination in hiring flight attendants by TWA?

[13] A I am not.

Q Are you aware, other than the San Francisco case that you previously testified about, of any lawsuit or agency settlement agreements or consent decrees with respect to allegations of racial discrimination by TWA in the flight attending categories?

A The only cases I recall of that type were scattered individual cases involving the termination of employees. I recall one where we—well, the man wasn't terminated, he was not promoted, and he charged that we had not promoted him because he was black, and we made a settlement with him out of court, as it were.

I am not aware, Mr. Pryor, of any other cases involving flight attendants which were laid on us based upon racial grounds.

Q I probably know the answer to this question already, but do you know if the settlement made with that individual included a non-admissions clause?

A I think it did, yes.

Q I imagine it would.

A Yes, yes.

Q Did TWA ever have a policy or practice of not hiring married women as flight attendants?

A Well, there was a time up until 1957 when we [14] must have had such a policy, because until that time when you became married, you had to leave your job. So based upon the logic of that rule, I would assume that if you were married, you probably weren't hired.

That rule was changed in 1957, and at least since that date we have not discriminated against people based upon their marital status.

Q Did TWA ever have a policy or a practice of not hiring persons over a certain age as flight attendants?

A By the same process of reasoning, we had a rule that when you attained age 35 you had to leave, and again, inferentially, if you applied for work after 35 during the time that that rule was in effect, you would not have been hired.

That rule was negotiated out sometime in the sixties. I know we were the first airline to get rid of both the marriage rule and the age rule.

(Enter Mr. Fehr.)

BY MR. PRYOR:

Q Do you know if the age rule was negotiated out before or after the effective date of the 1964 Civil Rights Act?

A I think a year or two after.

[15] Q So if the Civil Rights Act went into effect in '65—

A '65.

Q —it would have been '66—

A '66, '67, somewhere in there.

Q But before that TWA's policy was to terminate the employment of flight attendants at age 35?

A That is correct.

Q Are you aware of any other racial groups or ethnic groups or sex groups or religious groups that were not hired or permitted to be employed as flight attendants by TWA that we haven't already covered?

A No, I am not.

Q Is TWA presently experiencing a period of reduction in its work force?

A It is.

Q Are employees being furloughed?

A They are.

Q Does that apply in both union-represented and non-union represented categories?

A It does.

Q Does it apply to the attendants?

A Up to this point it has not.

Q It is true, is it not, that under the flight [16] attendants' collective bargaining agreement, before a flight attendant can be furloughed, there must be offered a number of leaves of absence equal to the number of flight attendants who would be furloughed?

A It is also true, if you will read the sentence in the agreement right after that, that the number of leaves that are authorized is solely at the discretion of the company.

Q When it is anticipated that flight attendants are to be furloughed, the contract requires the company to offer an equivalent number of leaves of absence at the domiciles where the furloughs would occur, but then the granting of the leaves and the duration of the leaves are at the company's discretion?

A Yes, sir.

Q And at the present time, to your knowledge, are there any flight attendants on furlough because of reduction of force?

A To my knowledge, which is precise as of this moment, there are no flight attendants on furlough.

Q Are there flight attendants who are on leaves of absence in lieu of furlough?

MR. HARTUNIAN: I will object to use of that phrase. I don't know what that means. Not only [17] do I not know, but I think it is incomprehensible.

MR. PRYOR: I will rephrase the question.

BY MR. PRYOR:

Q Are there attendants who are on a leave of absence that was granted to them after being offered pursuant to Article 12(B) of the agreement?

MR. HARTUNIAN: Wait a minute. I want to look at that. What page is that?

MR. PRYOR: Page 85.

BY THE WITNESS:

A The answer is negative.

BY MR. PRYOR:

Q There are no such flight attendants who are on what I refer to as a leave in lieu of furlough?

A There are hundreds of flight attendants who are on what we call butterfly leaves, which is a leave which takes place throughout the year. What triggers the leave is not a formal notice of furlough, as stipulated in that agreement, but it is a kind of a joint meeting of the minds between flight attendants and management. Fight attendants know we have the policy of offering leaves of absence, and many wish to take advantage of that policy and go to school or take a vacation or go skiing, and they apply for a butterfly leave. And all [18] of the persons presently are not working and on leave are on that kind of leave rather than on the leave specified in the agreement, because we have made no posting of a furlough in any domicile to this date.

Q It is true, is it not, that if there were not those number of flight attendants on butterfly leaves of absence, that the company would be experiencing furloughs—or we will call them Article 12(B) leaves of absence?

A I think that is a fair assumption.

Q Do you know how many flight attendants are presently on butterfly leaves?

A My impression is that the number ranges from 400 to 600.

Q Does TWA presently plan any additional reductions in the flight attendant work force?

A To my best knowledge—

MR. HARTUNIAN: Object to the form of the question. There has been no testimony of any reduction in the work force. So the word "additional" is objectionable.

MR. PRYOR: I will rephrase it.

BY MR. PRYOR:

Q How many flight attendants does TWA have [19] working for it now who are not on leave of absence?

A Oh, somewhere in the range of 6,000 to 6,200.

Q Does TWA presently plan to reduce that number?

A My best information as of today is that in the forthcoming 90-day period it does.

Q Are these types of plans made over 90-day periods commonly?

A Commonly we like to plan over 90 days, but we are in an extraordinary situation today. We have got a combination of factors, including the price of fuel, the onset of the recession, which is forcing us to really take a look at our levels of flying almost on a weekly basis, when you are dealing with large numbers of people. And one of the frustrations that your client has is our inability to forecast accurately what our surplus might be at any given time. My best guess is that we will have a surplus of flight attendants beyond those working and on butterfly leave, and we may run into that surplus sometime in the next 90 days.

Q What is your best estimate or prognosis of the numbers by which the flight attendant work force will have to be reduced in the near future?

MR. HARTUNIAN: I want to interject with—I guess this is an objection, but it isn't exactly.

[20] I just want to advise Mr. Crombie that he really shouldn't speculate, that he should do so only on the basis of some solid information that he has, so that he can prognosticate these things without guessing.

THE WITNESS: I understand the abjuration and maybe I shouldn't be this forthcoming, but I don't have that kind of solid information. I am speculating. I am guessing. And I am trying to be responsive. And one of the things I am afraid of, Mr. Hartunian, is leaving the impression in a forum such as this, which I take quite seriously, that we won't furlough flight attendants, when in fact circumstances might require us to do that, and that knowledge would be forthcoming as early as a week from now. I would feel that that would leave an impression of non-credibility in everybody's mind here, if I said, "Well, I don't expect we are going to furlough any flight attendants," and one week later 200 flight attendants got furloughed. That is really why I—and it is a speculation. Your characterization of it is correct.

BY MR. PRYOR:

Q Based on the information that is available to [21] you today, as well as your own experience—well, let me ask you this: You have experienced times of recession and furlough before, have you not?

A Yes.

Q Based on your experience and information that is available to you now, what is your best estimate of the levels of reduction in flight attendant numbers that are anticipated within the next 90 days?

MR. HARTUNIAN: To which we object because the witness has already stated in advance of that question that his answer must of necessity be based on speculation and guess, and the only trepidation the witness has stated—conscientiously, is that he would have to say

something and turn out to be wrong, which is understandable. But in terms of evidentiary basis, the witness has already stated he has no foundation upon which to make an evidentiary statement as to that. So I object because there is no foundation for it.

THE WITNESS: Counsel, do you advise me to speculate further?

BY THE WITNESS:

A I have already mentioned that we might find ourselves with a surplus in the range of 150 to 350 people within the next 90 days, and I just—that is [22] in the record. It is a speculation, and I just can't be more accurate than that.

BY MR. PRYOR:

Q Is it fair to say that the situation is so fluid and rapidly changing that at this time the accurate statements of how deep the reductions might go is not possible to make?

A Yes.

MR. HARTUNIAN: Or any reduction at all.

BY THE WITNESS:

A That is a correct statement.

BY MR. PRYOR:

Q And likewise you cannot say with any assurance that there will be no reduction at all in the next ninety days, is that right?

A That is correct.

Q You said that the situation is extraordinary today, and you mentioned several factors such as the price of fuel and the onset of a recession. It is true, is it not,

that TWA does experience seasonal fluctuations in its flight attendant work force every year, is that correct?

A That is correct.

Q And we are going into now the fall and winter [23] season when the flight attendant work force is normally at its low swing, is that a fair statement?

A That is a fair statement.

Q In a normal year—notwithstanding these extraordinary factors you testified about, what is the range of fluctuation from the peak season to the low season in the flight attendant numbers?

A You mean in total work force?

Q Yes.

A Well, I only remember one other occasion where we actually furloughed flight attendants, and normally we deal with this fluctuation through what we call personal time off and butterfly leave.

Q What I am asking is what is the range of numbers in the work force, say, at peak season verus the low season?

A You mean the requirement for flight attendants?

A Right.

Q It is also difficult to answer because the change of equipment complicates the problem. You need more flight attendants per large airplane. But I would guess that the requirement for flight attendants, the difference is in the range of three to six hundred people.

[24] A That is the seasonal fluctuation?

Q That is comparing February's need to August's need.

That, by the way, to make life a little more complicated, to show you how tenuous any speculation is in this area, it will be further complicated this year by the fact that we are making a large move into Florida from the Northeast, in an attempt to straighten out our level of operation and stop the seasonal peak. So this year that will be complicated. We are going to need more flight attendants in January and February and March than we would have needed if we hadn't gone into Florida.

The way we take care of the surplus, as we have in the past, is schedule a lot of vacations in January, February and March, and people take personal time and so forth and so on.

Q Even with the move into Florida, it is still true that you are not going to need as many flight attendants as you had in August?

A Yes. I would like to stress that the normal seasonal differential is exacerbated this year by our requirement to pull back the total operation because of the price of fuel, and because of the onset of a [25] depression, the depreciation in traffic that we are beginning to feel.

Q Are you affected simply by the increased price of fuel, but also by lack of ability to obtain sufficient quantities of fuel?

A Principally—

MR. HARTUNIAN: Well—go ahead.

BY THE WITNESS:

A Principally by the price. You can buy fuel—I don't know how this is relevant—on the spot market, for a dollar and 10 or 15 cents a gallon, as against an average price in 1978 or 38 cents. How long you can stay a viable company buying gas at a dollar-10 or 15 cents a gallon is questionable.

BY MR. PRYOR:

Q You are familiar, are you not, with the original settlement agreement that was negotiated between TWA and the plaintiffs in this case that is before the court?

A I have a general—not an expert familiarity.

Q Are you familiar with the amendment, the subsequent amendment to that settlement agreement?

A Maybe if you mention what the amendment was, I could tell you whether I was familiar with it or not.

[26] Q The amendment deals with the subject generally of union seniority for the returning class members.

A And that amendment stated what?

Q Let me show it to you. Any objection to—

A This was the agreement that was thrown out?

Q Let me show you the original settlement agreement and the amendment to the settlement agreement.

A Oh, you are not talking about the 1972 agreement?

Q No, I am talking about the settlement agreement that is presently pending before the court in this case.

A O.K.

Now, where is the question of seniority dealt with here?

Q I believe it is Section 5B.

A 5B? O.K., I note the difference.

Q Good.

I wanted to ask you a few questions about the settlement agreement and the amendment. When I refer to the settlement agreement, I mean the original agreement. When I refer to the amendment, I mean Section 5B.

[27] Did you participate in the negotiation of the settlement agreement?

A I participated in two respects. As to the question of free transportation—and we conceded early in the game, if you want to call this negotiation, that the seniority rule that would be agreeable to us was that which was negotiated at American Airlines.

Now, I did not sit down and go through this document. I think our counsel here, Mr. Carton, and Mr. Hartunian, worked out the specifics of the document.

Q Other than your counsel and your own role in bringing about the settlement agreement, who at TWA on the management side participated in the negotiations?

A In the negotiation of this agreement?

Q Yes.

A One other person had an effective voice, and that was our general counsel, Ulrich Hoffmann.

Q Aside from the lawyers then, though, you were the principal management official that dealt with the settlement agreement?

A I think that is correct, yes.

Q Are you the company official who will be primarily responsible for implementing the terms of the [28] settlement if it is approved by the court?

A I think not. I think the executives finally responsible for implementing the terms will be the vice-president in charge of the in-flight services department, Mr. Truex.

Now, with regard to the dispensing of the funds, the payroll department will do that. They will be given instructions by either my office or Mr. Hoffmann's, as to who is entitled to what, and they will simply pay it.

But with regard to the contracting of individual interested persons, when they would like to be trained, what domicile they would like to go to, what their druthers is concerning when they would like to come back to work—those operational things will be handled by the in flight services department.

Q Under the settlement agreement terms which provide for reinstatement of those members of the plaintiff class who wish to be reinstated, it is true, is it not, that there are a number of ways that that reinstatement could be effected?

A A number of ways?

Q Well, maybe I can give you some examples and you tell me if these are possibilities.

[29] You could I suppose use the process of normal attrition, simply wait for vacancies to occur, hiring no new flight attendants and bringing back the members of the plaintiff class as those vacancies occur. Is that one possibility?

A That is one.

Q Given the present state of the economy and the fuel problems that you have testified about, is that a realistic possibility at the present time?

MR. HARTUNIAN: Wait a minute. Are you asking him a hypothetical question which assumes that the returning class members would be ready to come back to work tomorrow or something? You are mixing up those 90 days with the return of the women, and obviously those two periods cannot coincide.

MR. PRYOR: I will rephrase the question.

[30] Q We were discussing various ways that the reinstatement of the plaintiff class members could be accomplished, and attrition is one possible way, correct?

MR. HARTUNIAN: Which what could be accomplished?

MR. PRYOR: The reinstatement of the members of the plaintiff class under the settlement.

MR. HARTUNIAN: I wish you would clear that up. Do you mean the return to active employment at—

MR. PRYOR: Yes.

MR. HARTUNIAN: —a domicile?

MR. PRYOR: Yes.

BY THE WITNESS:

A Could I answer that in my own way, and if it is not satisfactory you can question me again.

BY MR. PRYOR:

Q Sure.

A In the first place, Mr. Pryor, we are not talking about any member of either plaintiff class coming back to employment with TWA until there is a final order in this case—and I think it is very important to keep that in mind.

[31] When that final order will take place to some extent is in the control of your law firm and your plaintiff.

Q You may credit us with more power than we have.

MR. HARTUNIAN: No, he is not.

BY THE WITNESS:

A It is not impossible that we could be talking about a period a year away before there is a final order.

Now, in that period of time a great many things can take place. If we are still in a recessed economy we would all have a very difficult problem at that point because maybe we will have reduced the work force further.

But my own guess—and this is speculation—is that a year from now or a year-plus whatever from now, that the economy will have been squared away, that if there are flight attendants who have been furloughed they would probably be back on the payroll, and that we would be able to work out our obligations over the ensuing year in some kind of an orderly fashion by planning, getting a fix on how many mothers wanted to come back and when, offsetting that against the number of [32] new hires that we would hire, and I would guess if things worked out, as I would hope they would work out, that the bringing back of those who wish to return to work would be done in a reasonably orderly way consistently with the agreement that we have worked out, without a lot of complications.

Now, that is the best answer I can give you.

Q What I would like to find out is what—well, let me just ask you the question.

Does TWA plan to furlough any presently employed flight attendants or flight attendants who are then employed when it is time to allow the plaintiff class members to return to work, in order to create vacancies for the members of the plaintiff class?

A No, it does not, and I don't believe that the agreement that we have concluded with the class members contemplates that we must or would.

Q Does it contemplate that you will not?

MR. HARTUNIAN: Excuse me. You have asked him a question about what TWA's plans are vis a vis this possibility you invented of furloughing somebody to make room for the class member. His answer was definitely not.

[33] Now you are asking him purely a question of law, what he thinks the agreement contemplates, and we object to that.

BY MR. PRYOR:

Q Can you state on the record in this proceeding that if at the time the members of the plaintiff class in this matter are to be offered reinstatement pursuant to the settlement agreement, there are no vacancies existing in TWA's system for flight attendants, that TWA will not furlough presently employed flight attendants in order to create vacancies for the members of the plaintiff class?

A I think I have answered that question, but if you want it answered again the answer is we will not furlough people, nor do we feel we are obliged to furlough people to create vacancies to have class members return to work.

Q If at the time that class members are to be returned to work pursuant to the settlement agreement, there are TWA flight attendants on furlough or on leave of absence, does TWA intend to call back members of the plaintiff class ahead of any of those incumbent flight attendants on furlough or on leave of absence?

A I would distinguish between—and I would [34] like Mr. Hartunian to listen to this—I would distinguish between employees on furlough and those on leave of absence.

With regard to those on furlough, if vacancies arise they would have to measure their seniority against the seniority of a member of the class, and as a practical

matter I would suspect that the members of the class would take precedence over employees on furlough.

With regard to leave of absence, when they are brought back, they are not brought back to a vacancy per se. If persons are on leave of absence and their leave expires, we will bring them back, and if enough of them come back to create a surplus of employees we would then declare a furlough, and in that event those furloughed would have to measure their seniority for purposes of recall against members of the class.

Q Let me see if I understood what you said.

Is it a fair characterization of your plans to say that you will treat returning members of the plaintiff class the same as flight attendants on furlough, and recall them pursuant to the recall provisions of the collective bargaining agreement?

A Yes, that is a fair characterization.

[35] Q And if they are awarded their—if they are awarded retroactive competitive or union seniority by the court in this proceeding, then that seniority will be measured against the seniority of incumbent flight attendants who are on furlough, if any?

A Precisely.

Q At the time that you would be recalling members of the plaintiff class who wish to return, if vacancies exist are the then employed flight attendants entitled to bid on those vacancies before a recall is issued?

MR. HARTUNIAN: Excuse me. Is there such a thing as bidding on a vacancy?

MR. PRYOR: That is what I am asking.

THE WITNESS: Yes, there is.

MR. HARTUNIAN: Bidding on a vacancy?

THE WITNESS: Yes. If—

MR. HARTUNIAN: Excuse me. Do you mean by that somebody from a different operations list bidding to fill a vacancy? Is that what you are talking about?

THE WITNESS: Yes.

If for example we declare that there are vacancies in the Los Angeles domicile, under the [36] agreement it is possible, Mr. Hartunian, for a flight attendant to bid for that vacancy.

MR. HARTUNIAN: You mean a flight attendant somewhere other than Los Angeles?

THE WITNESS: Yes.

MR. HARTUNIAN: O.K., I understand.

THE WITNESS: And if there are six vacancies and fourteen flight attendants from New York come to bid, the six most senior flight attendants from New York are awarded those bids and they fill those vacancies.

BY THE WITNESS:

A Frankly, Mr. Pryor, I don't know the answer to the question you have posed.

It is a hypothetical situation and I just don't know the answer to that question. We haven't read the agreement with regard to the classes that carefully, in terms of the basic working agreement, for me to give you a responsive answer to that question. I just don't know.

Whether what we would do, what we think we would have to do, would be to allow the normal bidding procedure to roll around and people get in place and the absolute vacancies end up wherever they [37] end up, and then we would declare vacancies after the bidding process is over—that is a possibility, whether or not the agreement that we have made with Mr. Hartunian and his clients would require us to proceed otherwise, I just don't know. I haven't studied the two agreements that carefully.

I could offer something here gratuitously. I understand the concern of your clients for this matter, but in a normal business environment year after year we hire somewhere between 400 and 800 new flight attendants, and I

don't think 1979-1980 is going to last forever. I think we are going to be talking about a period a year from now before we start on the 200-odd people who would want to come back—and I certainly think we could work in in a normal year, with equity and reasonableness, a couple hundred women that might wish to come back over the course of the year.

I really don't think that is a big problem.

BY MR. PRYOR:

Q Would you tell us, sir, what the difference is between a flight attendant who is a schedule holder, and a reserve flight attendant?

A Yes. Each month in each domicile we post what [38] lay people like all you people would call work assignments. For the month of November those postings are up around the 10th of October.

Really what it says is we need six flight attendants to fly this sequence of flights through the month. The total is 73½ hours and we need 28 to fly this and 14 to fly that, and so forth. And that covers—that covers our schedule flying for the month. And those are bid holders. People bid and they are awarded their bid based upon their seniority.

The most senior person gets the best jobs—and the best jobs are defined differently by different people. If a married woman wants to be home with her husband every night she might take flights from New York into the Ohio Valley and back. If a more adventurous person, married or unmarried, wants to get away from home for a couple of days, she might bid a coast-to-coast flight back and forth. People bid their druthers.

Now, when that bidding is all over, we have to have a certain cadre of employees to take care of contingencies such as illness or other absences for unforeseen reasons.

If a flight attendant or a group of them [39] get

trapped out on a non-scheduled operation and they exceed the number of hours that they can fly in a given period of time, and they are illegal for their next flight, we have to have a cadre of people—they are called reserves. They are in each domicile and they are subject to be called up on short notice, to take a variety of flights.

Q In flight attendant terminology a schedule holder is also someone who is able to hold a line of time, is that—

A Right.

Q —another way of —

A Yes, that is the colloquialism that is used.

Q That means that he or she is able to plan his or her activities for that month with respect to when he or she is going to be flying?

A Yes, that is correct.

Q And a reserve is a person who because of a lack of seniority is—does not have enough seniority to hold a line of time?

A Yes, except that some people prefer to bid reserve for reasons that would take too long to go into here.

[40] Q And the desirability of particular flight schedules—some people measure it by how much money they can earn, correct?

A Yes.

Q Some people measure it by whether they have to fly a certain number of—

A —days in a month.

Q —days in a month. Others view what is called a turnaround schedule as being more desirable?

A Yes.

Q A turnaround schedule would be a schedule that doesn't require you to stay overnight—

A Right.

Q —at a layover station?

A Right.

Q You fly out in the morning and come back in the evening.

A One of the plaintiffs in this case is one of my daughters-in-law, and just before she left TWA she had one of those flights. She was senior enough to fly from LaGuardia to Denver and back the same day, and that was a real—that was a real great job because she picked up about eight hours of credit in one day and flew that for two days and had four off—nice job.

[41] Q And—

A Worked ten days out of a month.

Q Whether a flight attendant is able to bid and hold those desirable schedules, for whatever reason they may be desirable to that particular flight attendant, is determined by his or her competitive seniority?

A Yes.

Q And it is true, is it not, that the plaintiff class members who would be returning to work at TWA as flight attendants, would have sufficient seniority to be schedule holders rather than reserves?

A I would guess so, yes. I would be very much surprised if they weren't.

Q And in many cases because of the amount of seniority that they would have if this settlement agreement is approved with the award of retroactive union seniority, these persons would be senior schedule holders?

A I would guess that is correct, yes.

Q And when they return to the line, if they are awarded retroactive competitive seniority, they would be slotted in above other more junior schedule holders than themselves?

[42] A They would.

Q And because of that those other schedule holders would be farther from the top of the seniority list than they were before the plaintiffs returned to work?

A That is correct.

Q And thereby would be less able to bid and obtain the more—what we have called desirable schedules?

A Yes, that is correct.

Q And it is true, is it not, that if more schedule holders are added to the flight attendant complement—all other things being equal—that some of the junior schedule holders will be downgraded to reserve?

A Not impossible, not impossible.

Q In fact, it is quite likely in most domiciles, isn't that true?

A Well, again we are talking—I will go back to what Mr. Hartunian said earlier—we are talking about a time frame that might be a year or two from now. There is some attrition in this work force, you know. There are junior people who leave. I just don't know how many people would be knocked out of a bid down to [43] reserve, under the circumstances of which we are talking, about events a minimum of a year from now, and it could be as much as two years from now.

Q But without speculating as to what might happen between now and then, all other things being equal, if the number of schedule holders is increased the people at the bottom of the schedule-holding group are going to be forced down to reserves?

A Sure, all other things being equal, including a stable number of airplanes and so forth and so on.

Q And going on down this seniority roster, there are persons who are what we refer to as the senior reserves, who are awaiting the day when they will have enough seniority to become schedule holders, is that right?

A I suppose—I assume there are people, yes.

Q And if the members of the plaintiff class return to work as schedule holders—again all other things being equal—it will take longer for the senior reserves to achieve the status of schedule holders?

A Yes, that theory is accurate.

Q And finally, there are the junior reserves, the flight attendants at the bottom of the seniority list, who would be subject to furlough if the return of [44] the members of the plaintiff class created an excess of flight attendants?

MR. HARTUNIAN: Read that back, please.

(The pending question was read by the reporter.)

MR. HARTUNIAN: That has been asked and answered twice, I believe.

MR. PRYOR: No.

MR. HARTUNIAN: It is still the same question. You are asking will some people be furloughed because class members come back. That has been asked and answered twice—emphatically answered.

THE WITNESS: That is precisely—he is right.

MR. PRYOR: I think you are correct.

BY MR. PRYOR:

Q It is not TWA's intention to bring back the members of the plaintiff class at such a time that it—that in order to accomplish that it would be necessary to furlough the present employees?

MR. HARTUNIAN: That is objected to. You are really putting an argument into that question, which assumes that TWA could, if it wanted to, replace people then working with class members and [45] furlough those replaced people. He has said that they have no intention of doing that.

MR. PRYOR: Would you like to—

MR. HARTUNIAN: The question is—the form of the question makes it unanswerable.

Would you read it back, please.

(The pending question was read by the reporter.)

BY THE WITNESS:

A I think I have answered that twice, but I will answer it again.

No, it isn't our intention. For what it is worth, Doyle, you know, you are probably talking about people that haven't even been hired by TWA yet in a—you are talking about—you are speculating about some girl that is going to high school in Kansas today, who may be hired two years from now.

BY MR. PRYOR:

Q Who some day my client will have to represent.

A Yes.

Q It is true though, is it not, that if the returning members of the plaintiff class are brought back with retroactive competitive seniority—I will withdraw the question. Strike that.

[45A] Do international flight attendants make more money than domestic flight attendants?

A They do.

Q It is true, is it not, that there will be members of the plaintiff class who wish to return and will have the wherewithal to fill vacancies as international flight attendants? Is that correct?

A Yes.

Q Because of the size of the work force and the nature of the operation, it is not possible, is it, to identify the names and seniority dates of the most junior flight attendants who are schedule holders or the most senior flight attendants who are reserves, for any period of time in the future, is it?

A No, it is not.

Q You have to take it almost on a daily basis, is that right?

A That's right.

Q Are you aware of any flight attendants employed by TWA, or who were employed by TWA during the period of TWA's no-motherhood, in quotes, policy, who gave up marriage or having children in order to keep working as flight attendants?

A I am not aware of any such person.

[46] Q Are you familiar with TWA's retirement plan for flight attendants?

A Yes, generally.

Q Is it true that both TWA and the flight attendant employees contribute to the fund?

A Yes.

Q The present flight attendant employees of TWA have made such contributions during the term of their employment, is that right?

A That is correct.

Q And TWA has contributed specific amounts for those employees and on their behalf, to the retirement fund?

A That is correct.

Q During the period since the termination or resignation of the members of the plaintiff class, TWA has not made any contributions to the retirement fund on their behalf?

A They have not.

Q If the court restores union seniority to the members of the plaintiff class who return to work at TWA, will they be credited with years of credited service under the retirement plan?

A I don't know. The agreement with those people [47] that Mr. Hartunian represents is silent on that point, and how we will work that out, whether it would be a subject of bilateral negotiations with your client—I just dont' know at this particular point in time.

Q Has TWA agreed, or does it have any plan to contribute to the fund on behalf of the returning class members for those years that they did not work?

A We have no present plan to do that.

Q Or agreement?

A Or agreement.

Q Is there any agreement or plan to collect contributions from the returning class members for those years that are restored retroactively?

A As I said, counselor, this question falls within the

purview of an earlier answer. The agreement is—with Mr. Hartunian and his clients—is silent on that point, and I am sure it will be an issue to which we will address ourselves or be forced to address ourselves, and what we will do I don't know.

Q I take it then you also don't know whether they will be entitled to retirement benefits based on any years that are restored to them—

A No, I do not.

See, the retirement plan, among other [48] features, is a contributory plan. Not all flight attendants are members of the plan. Whether some of these people coming back would choose to remain members, whether they were members before—I just don't know. There is a whole host of questions here to which we have not addressed ourselves.

MR. PRYOR: Let me just take a minute to confer with Steve.

(Brief interruption while Mr. Pryor and Mr. Fehr left the deposition hearing room.)

MR. HARTUNIAN: Mr. Crombie—

MR. PRYOR: I have just a couple more questions.

MR. HARTUNIAN: Sorry.

BY MR. PRYOR:

Q Mr. Crombie, under the terms of the settlement agreement TWA has agreed to do certain things which will lead to the reemployment of the members of the plaintiff class within one year following the final order date, as that term is defined in the agreement, correct?

A Yes.

Q So I guess what I want to know is if the settlement is approved, obviously TWA will be obligated to do these things within the time period specified [49] after the final order date, but does TWA have any plan or intention of taking steps to return members of the plain-

tiff class before the final order date, as defined in the settlement agreement?

A No, we have no such plans. We are not going to do anything until the final order is signed.

[50] Q You testified that your role in the negotiation of the settlement agreement related to, among other things, the amout of money that was going to be paid pursuant to the settlement.

A Uh-huh.

Q Under the terms of the settlement there is a total monetary payout of $3 million—

A Uh-huh.

Q —one-half of which is to be paid to members of class group A, and one-half of which is to be paid to members of class group B.

Did TWA offer to pay a total of $3 million to be divided up however the class members wished, or did TWA make an offer of a million-five to one class and a million-five to the other?

THE WITNESS: Excuse me just a minute.

(Here followed a conversation between the witness and his attorney, Mr. Carton, scoto voce.)

BY THE WITNESS:

A The key number for us was three million bucks. There were lots of conversations among the—myself and Mr. Carton and Mr. Hartunian, Mr. Shure and Mr. Hoffman, and where we ended up is where we ended up.

[51] CROSS-EXAMINATION

BY MR. HARTUNIAN:

Q Mr. Crombie, as I understand your testimony and as I understand the agreement, no returning class member will be assigned to a base unless there is a vacancy at that base?

A That is correct.

Q In order to determine what is a vacancy I would like to ask you some questions—and I may be able to shorten this.

Is it correct that whether or not a vacancy or vacancies exist at one base or another, is purely a function of how many people TWA wants to see listed at that base?

A Well, it is rather a function, Mr. Hartunian, of what we conceive to be for a given period—a given month—our manpower or womanpower needs to cover the flights that are going to originate at that base.

Q So that is a matter of your own business judgment?

A Yes, it is.

Q Assuming that there is some base somewhere—let's just take a hypothetical. Let's say—

A Boston.

[52] Q Let's say Boston, both domestic and international—I believe there are some 700 odd people listed there, right?

A Right.

Q You could tomorrow decide that you want 800 some odd people there?

A That is correct.

Q That would mean that there would be 100 vacancies?

A That's correct.

Q And assuming also hypothetically that with a complement of 722 people listed both domestic and international at Boston, if you decided that you would rather see 600 and some odd people there than 700 and some odd people, and through a combination of attrition, resignations and furloughs it came down to just five over the number you wanted—or rather five less than the number you wanted—then even after all that there would only be five vacancies instead of 105?

A That is correct.

Q So in other words you couldn't put it any more accurately than what you said earlier, which is that the number of vacancies is purely a function of what TWA determines is the number it wants at any [53] particular base?

A That is correct.

Q Now, is it correct that from time to time the number of people on any particular list may change for a variety of reasons? For example, the death of somebody on the list would cause the number of people on that list to be that much less—less by one, right?

A Right.

Q And there are resignations from time to time, and retirements?

A That's right.

Q Promotions also would account for the departure of somebody from a particular base?

A That's right.

Q Job changes not necessarily involving promotion? A person might go from flight attendant to some other job and thus—

A That's correct.

Q And then as you testified, expansions and contractions because of seasonal business or economic conditions causes the number on any list to change from time to time?

A Yes, and that is the biggest single factor, the expansion-contraction factor.

[54] We have a term, putting time into a base or taking time out, and it normally relates to the most economical way to pair up the flight attendants so we can get as much work out of them in a given month as is possible under the agreement.

Q Now, Mr. Pryor asked you some questions which elicited your description of present conditions as being something akin to a reduction or at least a movement toward reduction the way things look now, looking to the next 90 days, is that right?

A Yes, sir.

Q Similarly, by virtue of those same facts, if all of the class members were to return today—and let's say they all finished their retraining last night—they would be faced with the situation today where there is no vacancy at any base?

A That's correct.

Q So if all of those class members came back either today or at some time in the future when conditions are the same as they are today, they would not be assigned to any base?

A That's correct.

Q And therefore that combination of facts would result in no dislocation or hardship or change to anybody [55] presently employed?

A That's correct.

Q I don't know if you know these figures. With respect to the number of people who have left the status of flight attendant for the various reasons that I described: Death, resignation, firing, retirement, promotions and so on, were there—have there been this year a total of 101 such removals from one list or another?

A I heard a figure of 112 or 114 the other day—We are not that far apart—which is sort of a shocking figure for me—or to me, because back several years ago the turnover rate in this group was about 20 percent a year, now it is down to practically zilch.

Q In 1978 were there about 114?

A Yes, that is my recollection.

Q In prior years the turnover that you described as 20 percent means that in those years 20 percent of the total force left for any one of these reasons we have described?

A Yes.

What happened—and I am going back some years—but there was a period in the late 60's when the average seniority among this work force was [56] around 22 months; it is now over nine years.

Q The average seniority now is much higher than it was ten years ago?

A Oh, yes, yes, materially higher.

Q Has that average seniority steadily increased?

A Yes.

Q Has that been partly a function of the fact that the 35-year age limit was brought to an end?

A That's right.

The marriage rule was brought to an end, the mother's rule was brought to an end, more men had been employed and the job pays more—it is a pretty good job.

Q Now, I believe you testified that right now there are somewhere between 400 and 600 women on leave?

A Yes, that is my best estimate.

Q Is it correct that every one of those women who are on leave now are on leave by virtue of their own free will?

A Yes.

Q Every one of them voluntarily applied for a leave?

A Yes.

MR. FEHR: Excuse me. You would be referring [57] to flight attendants on leave, wouldn't you?

I am sure there are a number of males that are—

MR. HARTUNIAN: If I used the feminine gender that only shows my bias in this case.

BY MR. HARTUNIAN:

Q And as I understand your testimony, Mr. Crombie, the situation today because of economic conditions and this season being a deflated season anyway in the normal course of things, you have elected to become more permissive in granting leaves that have been requested?

A That's correct.

Q More permissive than you otherwise might have been?

A That's correct.

Q Is it your practice today to give leave to anyone who asks for it?

A Generally, yes, depending upon differences in the given domicile.

For example, we had to withhold some leaves in the New York international domicile that were requested for September because we just couldn't get people moved in there fast enough to train them to take the place of those who requested those leaves. We had [58] to turn them down. But as a broad generalization, Mr. Hartunian, anyone who wants a leave today has a very, very good chance of getting it.

Q So is it fair to say that not only are all of the women on leave now—all of the flight attendants on leave now—people who asked for leaves, but in addition there are some people who asked for leave who didn't get it?

A That is correct.

Q Now, you have testified that TWA has no intention of implementing the return to work of any of the class members until a final order date—

A Yes.

Q —has occurred.

A Yes.

Q Do you understand that final order date to mean not just the entry of an order by Judge Roszkowski, but the date when that order becomes final within the definitions of the agreement?

A Yes, I do.

Q And that means the conclusion of all the appellate processes that might and probably will occur in this case?

A I understand.

[59] Q So only then does the period begin when you start offering retraining classes to those class members who have indicated that they want to come back?

A Thats' correct.

Q Then there is another year in which you have to implement that retraining?

A That is correct.

Q Hypothetically assuming a delay of six months to a year from now will occur before a final order date, that would mean that the retraining process would not be completed until sometime between a year and a half and two years from now?

A That's correct.

Q Now, with respect to the possibility that a non-class member employee would not return from furlough because of the advent of the return of a class member, is it correct, Mr. Crombie, that in order for that to happen, first of all there would have to be a furlough?

A That is precisely right.

Q And you don't know for sure whether there will or will not be any furlough?

A That is right.

Q You don't know either for sure or based on any solid basis—I think was the words you used—that [60] there will be as much as one furloughed person between now and two years from now?

A I can't state with any assurance that would take place. On the other hand, as I previously testified, I can't state with any assurance that that will not be the case.

Q Assuming that there are furloughs, one or more furloughs between now and the time any class members complete retraining—assuming that were the case—then in order for a furloughed employee to find himself or herself unable to return in the time that he or she would have returned but for the advent of a returning class member, that would have to happen as follows, wouldn't it: Namely, that TWA would have to make a determination that it's time to bring in some more people into that base where there were some furloughs, and that

would have to happen at the same time that there was then poised to re-enter the system a returning class member or members, is that correct?

A That is correct.

Q And inasmuch as people who are furloughed are the most junior people on the list, is it not correct that in order for that to happen, that is, in order for this situation, this hypothetical situation of a furlough [61] followed by TWA's decision to reverse the effects of the furlough—all of which would have to happen a year and a half to two years from now—isn't it correct, based on that hypothetical which assumes a lot of facts, that in all likelihood the hypothetical furloughed employee would be somebody who hasn't even been hired yet?

A That is what I alluded to earlier.

MR. PRYOR: Excuse me. I want to object to the form of the question because somewhere back at the beginning of it it assumed a fact that is not consistent with the collective bargaining agreement, that the persons who are on furlough necessarily are the most junior flight attendants on the list.

It is possible, I believe, for flight attendants to accept furlough rather than transfer to another domicile and bump the most junior flight attendant in the system. So I think that the question assumes facts that are not only not in evidence but simply not true.

BY MR. HARTUNIAN:

Q And was that what you had in mind when you referred to the gal or guy who was the subject of Mr. Pryor's questions about furlough and the hardship [62] caused by that furloughed employee by the return of a class member, in all likelihood being a person now in high school somewhere in Kansas?

A Yes, that was the reference that I made.

Q Has TWA hired 500 and some odd people each year for the past few years?

A That is a good, round number. Some years more, some slightly less. I think we have hired as many as 800 in a year in the past few years.

Q And naturally those people were hired because TWA's business judgment was such that it declared vacancies?

A Yes. We needed them.

Q Is there any reason you know of why you don't expect that to happen next spring?

A I alluded to that in part in answer to another question, Mr. Hartunian. At the present time we have no plans to hire people in the last quarter or indeed in the first quarter of 1980, which is normally our big recruitment and hiring period. People go into training programs normally around the end of March or in April. We have no such planning at the moment.

Q How about 1981?

A My feeling is that if we get [62a] through 1980 without hiring anybody, unless the economy of this country goes completely to pot we will be back on a normal hiring sequence.

Q And if so—

A Which means in the fall of 1980 we will be recruiting flight attendants again.

Q And if by then or in the spring of 1981 you were faced with a manpower situation which would, except for the class members, call for the hiring of 500 and some odd people, instead of hiring those 500 and some odd people you would only hire 200 and accept some—excuse me—you would only hire 300 and then take these 200 class members who want to return to work?

A Yes, that would be our normal planning process. [63] Q Has TWA hired 561 new flight attendants this year?

A That sounds like a familiar number.

Q And of course whenever you hire the next 100 or 200, or however many it is, they become the most junior?

A Yes, that is correct.

Q And they would then be the ones who would be furloughed?

A That's correct.

Q Now, when—

(Mr. Shure prepares to leave the deposition hearing room and the following proceedings are had herein:)

MR. PRYOR: Do you have any objection to our continuing on in your absence?

MR. SHURE: No, go right ahead.

(After Mr. Shure's departure the taking of the deposition proceeded as follows:)

BY MR. HARTUNIAN:

Q If at some time in the future TWA decided to give notice of furlough to one or more bases, the most [64] junior people would be the ones who would get that notice of furlough, right?

A Yes, sir.

Q Those persons then have an option, do they, to displace somebody on another base where there are people junior to him or her?

A Yes.

Q In such an event that person—

A The first thing—let me state, Aram, that my understanding of the procedure is that the first thing that would happen is that if we declared there was a surplus at a given base we would be required to request leaves of absence at that base—personal leave of absence—and we would either get sufficient leaves or we would not—to cover the furlough.

In either event, if we didn't get sufficient leave some number of people would be furloughed. Even if we got sufficient leave we could exercise a right not to honor all those leaves, but to furlough some.

The next action in the furlough procedure is that the person subject to furlough at that base looks around the system to see if there is someone junior to him or her, where he can go, and he elects, if he [65] chooses, to go there, and then that person drops off the end of the pile.

Q O.K., that is an option that is open to the furloughed employees?

A That's right.

Q But it is not mandatory, is it? That person can cimply accept the furlough?

A Yes, that is correct.

Q And then wait for the time when there is no longer a surplus and that person could then return?

A Right. And normally I think they would accept the furlough because it means moving. If you are married, for example, and you live in Boston and the opening is in Chicago, and you have a child, you probably—and your husband is employed as an attorney making large amounts of money—you probably wouldn't want to leave Boston. So that is an option that isn't exercised too frequently.

Q But it is an option which the employee can, if that employee—if that flight attendant sees fit—can exercise?

A Yes.

Q In such case that employee has a choice then of transferring literally—I don't mean to use that [66] word the way it is in the agreement—but to change residence to the new domiciliary list?

A Yes, at his or her own expense.

Q The moving expense, you mean?

A Yes.

Q Or that person can commute, if that person wants to?

A Yes.

Q If that person wanted to commute, does he or she have the right to take space on flights on a jump-seat basis?

A Yes.

Q Is that called X-cap?

A X-cap, right.

Q That is a right which such a person has in order to commute to the base to which that person chose, rather than be furloughed?

A Right. But to frame that in—in order to make the thing realistic, the persons subject to furlough would normally be reserves, and it would be very hard to discharge the obligations of a reserve as spelled out in the agreement, if you had to commute from Kansas City to Boston, because a reserve has to be on stand-by at certain periods of time, and it just is not practical.

[67] Q Well, that is illuminating, and I thank you for that. In other words, a person furloughed will in all likelihood be a reserve to begin with?

A Oh, yes, yes.

Q So by being furloughed that person would lose whatever is the inherent worth of being on reserve status?

A That's correct.

If we got into the furloughing of bid holders we would be into a very very big furlough, and I don't anticipate anything like that.

Q I think you mentioned that in the bidding for routes—if I may use that simple word—what is desirable for one person to bid for is not necessarily what is desirable for another?

A That is correct.

Q I think you said, if I heard you correctly, that some people actually prefer reserve status.

A That is correct.

Q I believe there was a question Mr. Pryor asked you, the answer to which was that in the event of a vacancy at a time when the class members were poised to come back, that the return of that class member would push

somebody with less seniority on that list down [68] further from the top?

A That is correct.

Q That isn't literally correct, is it? Isn't it correct that there would have to be a vacancy, and what would happen then would be that by the return of a class member to fill that vacancy, a person junior to the returning class member would still be exactly as far from the top as he or she was to begin with? It is just that he or she didn't get to move up a notch?

A Well, when push comes to shove—I mean, we can go on or off the record here—but the big problem with the people that Mr. Pryor represents is the kind of bidding opportunities that they will be deprived of.

Let's take a relatively small base like Boston, and let's assume that there are 20, 25 cream puff jobs at Boston.

By cream puff, I mean the job of flying from Boston to Denver and back the same day—and I am not even sure there is such a job—but there are cream puff jobs, and the 20 senior people do that, and all of a sudden into the base, which is a relatively junior base, appear 15 mothers all seniors to all but the top two presently there. [69] Now, what happens in that event is that 18 of the 20 cream puff holders have to scrounge around and look for something else. That is basically what the problem with seniority is. I don't think these people are concerned about—oh, they mutter a little bit about people coming back and getting high pay, that have been off on their own for ten years, but basically when push comes to shove the concern is someone is going to come in and move me out of my bid, and that ain't fair. That is what we are talking about.

Q You don't mean to suggest that the hypothetical numbers you just portrayed are in any way accurate or realistic, do you?

A In a small domicile it is not impossible—

Q Do you know—

A —because some of these people coming back would

be coming back with—I don't know—15, 18 and 20 years of seniority, I would guess, and that is a lot of seniority in bases like some of the—some of the smaller bases.

Q Do you know of any cases in which there is a substantial number of class members who would have 15, 18, 20 years of seniority?

A Well, I am trying to think. I only really know [69a] one class member well, and she would be now 35 years old. She started at 21—she would have 14 years of seniority, less the amount she would take away because of having babies and so forth. So let's assume she had 12 years of seniority. In Boston that is a lot of seniority.

Q Well, does that mean to say to you that in your opinion the major impact of the return of the class members will be to deprive—not to deprive, but to move down a notch or a number of notches those women who have enough seniority at some particular base to get the most plush, most sought routes?

A I think basically that is it.

Now, there is a certain—going to be a certain amount of emotional rancor expressed about why should she come back, I have been here for all these years and have been trying to fight my way up to the top rate, and she is getting the top rate of pay—but I think the real—I have talked to a few flight attendants. The real push is the fact that somebody comes in, some number come into a base, and people who have had their druthers for quite a while on the jobs they bid are going to be downgraded on their bids. I think that is the big rub.

[70] Q Isn't it correct, Mr. Crombie, that had these class members never been terminated in the first place—

A They would be there anyway.

Q —they would be there anyway, and the women whom you refer to as grumbling wouldn't be in the positions they are now?

MR. PRYOR: I am going to object to the form of the question as calling for speculation and conjecture. Whether these class—

MR. HARTUNIAN: The whole thing is speculation.

MY. PRYOR: Whether these class members would have been there since 1970, given the turnover rates that Mr. Crombie has already testified to, is entirely speculative and hypothetical.

MR. HARTUNIAN: Sure it is. The whole thing is, as Mr. Crombie's entire scenario about some women having a cream puff position now, and the numbers he is talking about and her grumbling is all hypothetical. I mean merely to join Mr. Crombie in that hypothetical.

BY MR. HARTUNIAN:

Q So I ask you, is it not correct that assuming all those same hypothetical facts that you just really [71] imagined, that if these women that you are talking about, these senior class members, had never been terminated in the first place, they might very well be in the very positions that the grumblers are now grumbling about?

MR. PRYOR: Same objection, as calling for a speculation, conjecture.

BY THE WITNESS:

A I mean if we are talking about a hypothesis, yes, that is part of the hypothesis.

BY MR. HARTUNIAN:

Q With respect to a junior schedule holder, that is somebody senior enough to hold a schedule but junior compared to the other schedule holders, that description of a hypothetical flight attendant being downgraded to reserve because of the advent of a class member or class members. In that situation the junior schedule holder would then become a fairly senior reserve, is that right?

A That is correct.

Q And so that person would then have to wait some period of time to get back to where he or she would become senior enough to be a schedule holder?

A That is correct.

[72] Q The delay is one which might be a short time, is that right?

A It might be a short time. It depends on the domicile.

In Los Angeles it could be a long time. Los Angeles people like to work in Los Angeles, and we have got people out there with seven or eight years of seniority that are on reserve because they can't hold a bid line.

Q The entire question of how much time that person, that junior schedule holder, would be delayed in resuming being a schedule holder, is a function of a lot of things, isn't it?

A Yes, it is.

Q Economic conditions?

A That's right.

Q Attrition by reason of death, resignation, promotion and so on? In other words, the whole question of how many vacancies occur, and when?

A That's correct.

[73] Q With respect to the retirement funds, does a new employee have to wait some period of time before he or she is eligible to become a member of the fund?

A My recollection is that they do, although we might have made a change in that in the last round. But my recollection is they have to wait a year. And that is easily ascertainable by looking at the agreement.

Q Once a person is eligible, then that person has a choice of joining or not, is that right?

A Correct.

Q Is this fund contributory by the employee?

A Yes.

Q So once a person elects to join the fund and becomes a member along with the others who have joined it, then deductions are made from that employee's checks?

A Yes.

Q And TWA also contributes to the fund based on actuarial figures?

A That is correct.

Q To put it probably more simply than is proper, but in order to simplify for these purposes, I take it that TWA makes a calculation actuarially to determine how much money is necessary to add to the employees' contributions so as to bring the fund up to the amount [74] of money necessary to accomplish the stated objective of the retirement fund?

A That is correct.

Q What happens to an employee who has made contributions for one year or two or five, and who then is terminated?

A If he or she is not vested, nothing happens; he just leaves, and the money that he has contributed remains in the fund.

If he is vested—or she is vested—and I forget what the vesting requirement is, whether it is five years or ten years—she has an option to let the money remain there and elect to retire at some age down the road, or she can withdraw her money at interest four percent, I believe.

Q If that person is terminated before the vesting period, which I think your recollection was five years?

A Yes, I believe that is correct.

Q Well, if back in the late sixties there was a one-year waiting period and a five-year vesting provision, that would mean an employee with six years' seniority or less if terminated would walk away from the plan and lose his or her money?

[75] A That is correct.

A And that money then goes into the fund and redounds to the benefit of everyone in the fund who survives that terminated employee, is that correct?

A Yes, that is one way to put it.

Q So that happened to some number of the class members in this case?

MR. PRYOR: Objection. That assumes facts not in evidence, and is speculative and conjectural because it assumes that plan that Mr. Crombie is testifying about as presently in effect was in effect whenever it was that the class members were terminated.

BY MR. HARTUNIAN:

Q Well, let me ask, Mr. Crombie, was a plan of the nature that you and I have just gotten through describing through questions and answers—was that in effect in the late 1960's?

A There was a retirement plan for flight attendants in effect then. I think it was a far less liberal plan in terms of its benefits and the plan now in effect. It was also a contributory plan.

A very small percentage of flight attendants were members of the plan, and for a lot of reasons, including the high turnover rate, they were [76] really only a relative handful of flight attendants who were in the plan.

Q Now, whoever they were and how many they were, those who were terminated with not enough seniority—that is, not enough time to become vested—simply lost—

A That is correct.

Q —the contributions which they had made?

A That is correct.

Q Now, I believe that at some point TWA decided that $3 million was the maximum amount of money which it would commit to offer to pay the class members as part of the settlement in this case, is that right?

A Yes.

Q Do you know in what form or manner the offer was communicated to the representatives of the class? First, let me ask you, did you personally communicate that offer to myself or anybody else representing the class, or was it Mr. Crombie?

A It was Mr. Carton.

Q You weren't present when that offer was made?

A No, I was not present.

Q You don't know then whether the offer was made in terms of a million and a half dollars to each of [77] the two classes?

A No, I couldn't testify that I was there directly and heard the colloquy between you and Mr. Carton.

Q Do you know in what form that offer was made? Do you know whether or not Mr. Carton offered a million and a half dollars to the two subclasses?

A I do not.

MR. HARTUNIAN: I have no further questions.

MR. PRYOR: Do you have any questions, Mr. Carton.

MR. CARTON: No.

MS. O'LAUGHLIN: No.

MR. PRYOR: I have a few questions Mr. Hartunian's questions generated.

REDIRECT EXAMINATION

BY MR. PRYOR:

Q The flight attendants who are presently on butterfly leave, is that leave such that there is a date certain when these flight attendants are scheduled to return to work?

A Yes, it is.

Q Will their return to work at the end of their butterfly leaves be affected in any way by the approval [78] or non-approval of the settlement?

A No.

Q You testified as to what your understanding of the present employees' concerns were regarding this settlement, and generally you have said their principal concern was about bidding, the effect of the return of the class members with union seniority on their ability to bid schedules and that sort of thing. Isn't it true that there are a lot of things—well, not a lot—there are things besides just bidding for schedules that are governed by flight attendants' competitive seniority under this collective bargaining agreement?

A I don't recall anything of enormous significance beyond bidding. You mean vacation preferences?

Q Okay, that is one. Vacation preferences are governed by union seniority. Furloughs are governed by union seniority.

A Yes.

MR. HARTUNIAN: Mr. Pryor, we will stipulate with you that senority is important.

MR. PRYOR: But I want to establish in what areas. Well, let me ask you this: We have made a list of the items in the collective bargaining [79] agreement and in the in-flight service manual that are governed by or affected by competitive seniority or non-competitive seniority, and had it marked Intervenor Union Exhibit 16. I think we can avoid this line of questions if we can agree that—if we may—that the Court can receive Intervenor Union Exhibit 16 in evidence.

MR. HARTUNIAN: I have not yet seen any Exhibit No. 16, but I can tell you that isasmuch as we will have no objection to the labor contract going in evidence or that manual you are talking about, you can argue all you want from that and you won't have to take the time of asking this witness to characterize one provision or another in those two volumes.

BY MR. PRYOR:

Q It is true, is it not, that a reserve flight attendant is required by TWA to be able to report for work at the airport within two hours of when he or she is called to work?

A Under certain conditions, yes.

Q Are there any conditions of which they are not required?

A You know, we have a standby rule, Mr. Pryor, [80] and if a person is put on standby, they can receive either less or more than two hours' notice. A person put on standby is being paid for it. Someone can say "We need you right now," and they have to go jump on the job.

But the two-hour rule is generally the case.

MR. PRYOR: That is all I have.

MR. HARTUNIAN: I have no further questions. Will you stipulate to signature.

MR. CARTON: All right.

MR. PRYOR: Waive presentment and signature?

MR. CARTON: Yes.

MR. HARTUNIAN: I suggest that at the first opportunity Mr. Carton examine the transcript. If there is some glaring error, he can make a correction. But I have certainly no insistance on signature.

MR. CARTON: Very good.

(Witness excused.)

[Certificate of notary omitted in printing]

INTERVENOR-UNION'S MOTION TO RE-OPEN THE RECORD FOR THE PURPOSE OF INTRODUCING EXHIBIT NO. 27 AND SUGGESTIONS IN SUPPORT THEREOF AND ATTACHMENT

[Filed on October 17, 1979 Sustained on November 28, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

Comes now the Intervenor-Union and today moves to re-open the record for the sole purpose of introducing Intervenor-Union Exhibit No. 27.

On October 12, 1979 TWA announced that 164 Flight Attendants would be furloughed effective October 30, 1979; and that an additional 70 Flight Attendants will be given the option of displacing Junior Flight Attendants at another domicile or being furloughed. The furloughs have an expected duration of eighteen months.

Exhibit No. 27 is the furlough notice issued by TWA on October 12, 1979. We believe that it is quite important that the record contain this Exhibit. Obviously, the return of class members with seniority may have a significant impact upon when and if the furloughed Flight Attendants are allowed to return to their jobs.

Respectfully submitted,

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WILLIAM A. JOLLEY

/s/ Scott A. Raisher
SCOTT A. RAISHER

/s/ Steven A. Fehr
STEVEN A. FEHR

[Certificate of service omitted in printing]

POST ON ALL FLIGHT ATTENDANT BULLETIN BOARDS IN ACCORDANCE WITH ARTICLE 12/B/ OF THE CURRENT WORKING AGREEMENT THE FOLLOWING FURLOUGHED NEW YORK INTERNATIONAL PURSERS ARE AWARDED THE FOLLOWING DISPLACEMENT OPTIONS EFFECTIVE OCTOBER 31, 1979.

SEN NO	PRN	NAME	DOMICILE	STATUE
3019	24259	CASAS R	JFK	C/A
3020	80482	DEOLIVEIRA F	JFK	C/A
3029	80482	VANRENSSELAER L	JFK	C/A
3034	31505	PHILLIPS J	JFK	C/A
3035	31490	BACHURETZ W	JFK	C/A
3058	31506	SANTINI B	JFK	C/A
3059	31498	EGAN F	JFK	C/A
3144	32074	MINEO D	JFK	C/A
3488	34478	LINGG Y	JFK	C/A
3662	35643	GILL C	JFK	C/A
3909	32158	STEPHENS H	NYD	C/A
4009	38591	LYLE J	JFK	C/A
4117	39165	RETTERER R	NYD	C/A
4205	39916	GILLHAM K	JFK	C/A
4348	42711	WILLIAMS L	JFK	C/A
4475	43796	MCQUIN-SMITH K	NYD	C/A
4478	43866	MACUR M	NYD	C/A
4510	43942	HOWARD F	NYD	C/A

NYCHA/DEWEY W.
END 1 of 1

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POST ON ALL FLIGHT ATTENDANT BULLETIN BOARDS IN ACCORDANCE WITH ARTICLE 12/A/ OF THE CURRENT WORKING AGREEMENT THE FOLLOWING NEW YORK DOMESTIC CABIN ATTENDANTS ARE FURLOUGHED EFFECTIVE OCTOBER 31, 1979. LAST DAY IN PRESENT STATUS WILL BE OCTOBER 30, 1979.

SEN NO	PRN	NAME
7063	67153	ROTUNDO S L
7062	67158	BROGAN M A
7061	67144	CLAUSEN J R
7060	67154	SALAMONE M T
7059	67142	BURK J P
7057	67156	WASHINGTON V R
7056	67140	PARISI P K
7046	67148	MCGARVEY S
7043	67150	MILLS H S
7041	67152	NOLDON R M
7036	67155	SCHROCK C B
7034	67146	FRAZIER B A
7032	67147	LARRAGUETA J A
7030	66556	POLK V R
7029	66548	FELDMANN J A
7028	66545	CORRENTI K A
7027	66544	BARDIZBANIAN A
7026	66547	DUNCAN L M
7022	66558	SINCLAIR H E
7021	66552	MCNAMARA J M
7020	66555	PENA A
7019	66550	KOEHNEMANN J T
7011	66561	WILD A T
7003	66553	MARTINEZ P J
7002	66546	DELAPAZ Y S
6995	66068	STANDQUEST D
6994	66045	POWELL J L
6985	66043	LOZA J A
6984	66066	SMITH J B
6983	66049	SZILAGYI S
6980	66061	ONEILL W G
6979	66050	TITKO-FRIED B A
6978	66052	TRAINOR E M
6977	66044	MAGUIRE D L
6976	63746	BRONDER G A
6975	66055	HARRIS B J

SEN NO	PRN	NAME
6974	66032	BISHOP C E
6972	66065	SARMANIAN G
6971	66053	DOYLE S M
6969	66036	COSEY D V
6968	66047	SEDEKIS S E
6967	66069	TEEPLE T
6963	66038	DOYLE M A
6961	66046	RODI L G
6957	65976	SOLIMEO S
6951	65990	BARTLEY L
6944	65979	OAKES S
6943	65974	SMITH A Y
6939	65925	BRUCH M
6938	65965	MOSELEY M
6937	65938	DIDIER R
6936	65973	ROGAN C
6935	65961	KILDOYLE K
6934	65954	GILL K
6932	65956	HENDERSON JR D
6930	65924	BRILL V
6929	65970	RAU S
6928	61264	TRUBIA L
6927	44342	CRAWFORD D

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IN ACCORDANCE WITH ARTICLE 12/B/ OF THE CURRENT WORKING AGREEMENT PERSONAL LEAVES OF ABSENCE ARE AVAILABLE TO FLIGHT ATTENDANTS AT THE DOMICILES WHERE THE REDUCTIONS IN FORCE ARE OCCURRING. THE NUMBER OF LEAVES BY DOMICILE ARE AS FOLLOWS. . . . . .

BOS-D C/A 18
BOS-I C/A 19

STL-D C/A

THE ANTICIPATED DURATION OF SUCH LEAVES AS WELL AS THE ANTICIPATED DURATION OF FURLOUGHS IS APPROXIMATELY 18 MONTHS. THE RECALL TO ACTIVE STATUS IS EXPECTED TO BE SECOND QUARTER 1981.

SINCE THE ABOVE LISTED FLIGHT ATTENDANTS ARE THOSE SYSTEM-WIDE FLIGHT ATTENDANTS WITH THE LEAST AMOUNT OF SENIORITY THERE ARE NO ANTICIPATED DISPLACEMENT OPTIONS NOR ARE THERE ANY VACANCIES IN THE SYSTEM.

IN THE EVENT THAT LEAVES OF ABSENCE ARE REQUESTED FOR THE ANTICIPATED PERIOD OF THE FURLOUGH IN EQUIVALENT NUMBERS BY CATEGORY AND LOCATION WHERE THE FURLOUGH IS AFFECTED THE ACTUAL NUMBER OF FLIGHT ATTENDANTS BEING FURLOUGHED WILL BE REDUCED ACCORDINGLY.

FURLOUGHED FLIGHT ATTENDANTS WILL BE RECEIVING FORMAL NOTIFICATION VIA U.S. MAIL ADVISING THEM OF THEIR FURLOUGH STATUS AND THE DATE AND TIME THEY ARE TO REPORT TO THE INFLIGHT SERVICES OFFICE FOR PURPOSES OF RETURNING COMPANY ITEMS—I.D. CARDS—LEAVING A MAILING ADDRESS WITH THE COMPANY—ETC. NYCHA/DEWEY W.

POST ON ALL FLIGHT ATTENDANT BULLETIN BOARDS IN ACCORDANCE WITH ARTICLE 12/A/ OF THE CURRENT WORKING AGREEMENT THE FOLLOWING CHICAGO DOMESTIC CABIN ATTENDANTS ARE FURLOUGHED EFFECTIVE OCTOBER 31 1979. LAST DAY IN PRESENT STATUS WILL BE OCTOBER 30, 1979.

SEN NO	PRN	NAME
6996	66072	HOOPS M P
6993	66042	LEWIS V L
6692	66070	WAGNER B A
6991	66059	MAHERAS C P
6990	66067	SMITH J G
6989	66041	LAMBRIGHT L S

SEN NO	PRN	NAME
6988	63136	BROWNLEE T E
6987	66054	ELMORE S A
6986	66057	LEPINSKY S E
6982	66048	SMITH T A
6981	66033	BERGER E
6973	66071	WEATHERS H M
6970	66062	PEREIRA J A
6966	66056	JULIANO K A
6964	66037	CRIBARI K A
6962	66040	HUMBLE P A
6926	65760	ETCHEVERRY M
6920	65747	ADAMS R
6918	65789	DREYER D
6917	65768	PRICE J
6914	65764	MCGORY J
6913	65762	HOYT E
6912	65761	HENDRICKS S
6911	65773	VOGELSANG C
6908	65791	HAYWOOD J
6906	65763	LYSAGHT R
6905	65805	WHITNER W
6904	65767	PLUCHECK C
6903	65749	ALVES M
6901	65790	ESTILL G
6900	65783	CASE M
6897	65758	DUVIELLA C
6896	65800	MATYJASIK J
6895	65804	STUBBLEFIELD C
6894	65793	HENRY M
6892	43420	GRANGENOIS G

IN ACCORDANCE WITH ARTICLE 12/B/ OF THE CURRENT WORKING AGREEMENT PERSONAL LEAVES OF ABSENCE ARE AVAILABLE TO FLIGHT ATTENDANTS AT THE DOMICILES WHERE THE REDUCTIONS IN FORCE ARE OCCURRING. THE NUMBER OF LEAVES BY DOMICILE ARE AS FOLLOWS.....

BOS-D C/A 18
BOS-I C/A 19
ORD-D C/A 36
JFK-D C/A 59
STL-D C/A 32

THE ANTICIPATED DURATION OF SUCH LEAVES AS WELL AS THE ANTICIPATED DURATION OF FURLOUGHS IS APPROXIMATELY 18 MONTHS. THE RECALL TO ACTIVE STATUS IS EXPECTED TO BE SECOND QUARTER 1981.

SINCE THE ABOVE LISTED FLIGHT ATTENDANTS ARE THOSE SYSTEM-WIDE FLIGHT ATTENDANTS WITH THE LEAST AMOUNT OF SENIORITY THERE ARE NO ANTICIPATED DISPLACEMENT OPTIONS NOR ARE THERE ANY VACANCIES IN THE SYSTEM.

IN THE EVENT THAT LEAVES OF ABSENCE ARE REQUESTED FOR THE ANTICIPATED PERIOD OF THE FURLOUGH IN EQUIPMENT NUMBERS BY CATEGORY AND LOCATION WHERE THE FURLOUGH IS AFFECTED THE ACTUAL NUMBER OF FLIGHT ATTENDANTS BEING FURLOUGHED WILL BE REDUCED ACCORDINGLY.

FURLOUGHED FLIGHT ATTENDANTS WILL BE RECEIVING FORMAL NOTIFICATION VIA U.S. MAIL ADVISING THEM OF THEIR FURLOUGH STATUS AND THE DATE AND TIME THEY ARE TO REPORT TO THE INFLIGHT SERVICES OFFICE FOR PURPOSES OF RETURNING COMPANY ITEMS—I.D. CARDS—LEAVING A MAILING ADDRESS WITH THE COMPANY—ETC.

NYCHA/DEWEY W.

POST ON ALL FLIGHT ATTENDANT BULLETIN BOARDS IN ACCORDANCE WITH ARTICLE 12/A/ OF THE CURRENT WORKING AGREEMENT THE FOLLOWING BOSTON INTERNATIONAL CABIN ATTENDANTS ARE FURLOUGHED EFFECTIVE

OCTOBER 31 1979. LAST DAY IN PRESENT STATUS WILL BE OCTOBER 30 1979.

SEN NO	PRN	NAME
7025	66532	NICCOLI M
7024	66533	NORMAND C
7023	66534	PROPP K
7018	66541	URBOWICZ E
7017	66531	MAXWELL K
7016	66528	HORN T
7015	66524	CAROLAN C
7014	66525	CONTI T
7013	66540	TIERNEY C
7012	66543	YORK C
7010	66529	LEMAK M
7008	66538	SCHULTZ J
7007	66536	REYNOLDS B
7006	66535	RAISHER C
7005	66527	DUNN N
7001	66542	WILLLAMS M
7000	66523	BOWEN B
6999	66526	DUMAS L
6998	66530	MARTIN P

IN ACCORDANCE WITH ARTICLE 12/B/ OF THE CURRENT WORKING AGREEMENT PERSONAL LEAVES OF ABSENCE ARE AVAILABLE TO FLIGHT ATTENDANTS AT THE DOMICILES WHERE THE REDUCTIONS IN FORCE ARE OCCURING. THE NUMBER OF LEAVES BY DOMILIE ARE AS FOLLOWS:

BOS-D	C/A	18
BOS-I	C/A	19
ORD-D	C/A	36
JFK-D	C/A	59
STL-D	C/A	32

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ANTICIPATED PERIOD OF THE FURLOUGH IN EQUIVALENT NUMBERS BY CATEGORY AND LOCATED WHERE THE FURLOUGH IS AFFECTED THE ACTUAL NUMBER OF FLIGHT ATTENDANTS BEING FURLOUGHED WILL BE REDUCED ACCORDINGLY.

FURLOUGHED FLIGHT ATTENDANTS WILL BE RECEIVING FORMAL NOTIFICATION VIA U.S. MAIL ADVISING THEM OF THEIR FURLOUGH STATUS AND THE DATE AND TME THEY ARE TO REPORT TO THE INFLIGHT SERVICE OFFICE FOR PURPOSES OF RETURNING COMPANY ITEMS—I.D. CARDS—LEAVING A MAILING ADDRESS WITH THE COMPANY—ETC.

NYCHA/DEWEY W.

POST ON ALL FLIGHT ATTENDANT BULLETIN BOARDS IN ACCORDANCE WITH ARTICLE 12/A/ OF THE CURRENT WORKING AGREEMENT THE FOLLOWING BOSTON DOMESTIC CABIN ATTENDANTS ARE FURLOUGHED EFFECTIVE OCTOBER 31 1979. LAST DAY IN PRESENT STATUS WILL BE OCTOBER 30 1979.

SEN NO	PRN	NAME
7058	67173	BLAHNIK J
7055	67175	DEBOER G
7054	67180	GROOME T
7053	67179	GIBBONS P
7052	67187	RAGO R
7051	67181	MARCORELLE R
7049	67190	TYCHESEN N

SEN NO	PRN	NAME
7048	67186	PERRON A
7047	67174	CARRIE A
7045	67192	WOLF K
7044	67182	MERWIN R
7042	67177	DRAPER K
7040	67178	GARRISON G
7039	67188	SHANNON B
7037	67191	STUBIG P
7035	67185	NELSON S
7033	67183	MILLER P
7031	67184	MORSE S

IN ACCORDANCE WITH ARTICLE 12/B/ OF THE CURRENT WORKING AGREEMENT PERSONAL LEAVES OF ABSENCE ARE AVAILABLE TO FLIGHT ATTENDANTS AT THE DOMICILES WHERE THE REDUCTIONS IN FORCE ARE OCCURRING. THE NUMBER OF LEAVES BY DOMICILE ARE AS FOLLOWS. . . .

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BOS-I	C/A 19
ORD-D	C/A 36
JFK-D	C/A 59
STL-D	C/A 32

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IN THE EVENT THAT LEAVES OF ABSENCE ARE REQUESTED FOR THE ANTICIPATED PERIOD OF THE FURLOUGH IN EQUIVALENT

NUMBERS BY CATEGORY AND LOCATION WHERE THE FURLOUGH IS AFFECTED THE ACTUAL NUMBER OF FLIGHT ATTENDANTS BEING FURLOUGHED WILL BE REDUCED ACCORDINGLY.

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NYCHA/DEWY W.

MESSAGES FROM STAFF

POST ON ALL FLIGHT ATTENDANT BULLETIN BOARDS IN ACCORDANCE WITH ARTICLE 12/A/ OF THE CURRENT WORKING AGREEMENT THE FOLLOWING ST. LOUIS DOMESTIC CABIN ATTENDANTS ARE FURLOUGHED EFFECTIVE OCTOBER 31 1979. LAST DAY IN PRESENT STATUS WILL BE OCTOBER 30 1979.

SEN NO	PRN	NAME
6960	65930	CAREY H
6959	65969	QUINLAN K
6958	65928	CAPPO C
6956	65943	DUFFY M
6955	65980	FABER D
6954	65948	FLYNN J
6953	65950	FRYE L
6952	65967	PETRIE K
6950	65977	TROTTER L
6549	65937	CHRISTENSEN M
6948	65958	HOLLAND P
6947	65966	NAGY B
6946	65968	PROUD B
6945	65923	BAYAS C
6942	65921	AVON A

SEN NO	PRN	NAME
6941	65946	DUNN E
6940	65963	LESNICK J
6933	65960	KEISER K
6925	65751	BARNES S
6924	65797	KYLE K
6923	65776	ACOSTA R
6922	65769	STIEBERITZ P
6921	65799	MCHALE J
6919	65755	BREWI P
6916	65777	ANDERSON C L
6914	65785	DOSS B
6910	65756	BUTLER P
6909	65779	BECKER D
6902	65782	BROWN M
6899	65796	KARAVAN C
6898	65771	URBANSKI L
6893	63447	STARCKE C

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IN ACCORDANCE WITH ARTICLE 12/B/ OF THE CURRENT WORKING AGREEMENT PERSONAL LEAVES OF ABSENCE ARE AVAILABLE TO FLIGHT ATTENDANTS AT THE DOMICILES WHERE THE REDUCTIONS IN FORCE ARE OCCURRING. THE NUMBER OF LEAVES BY DOMICILE ARE AS FOLLOWS.....

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BOS-I	C/A	19
ORD-D	C/A	36
JFK-D	C/A	59
STL-D	C/A	32

THE ANTICIPATED DURATION OF SUCH LEAVES AS WELL AS THE ANTICIPATED DURATION OF FURLOUGHS IS APPROXIMATELY 18 MONTHS. THE RECALL TO ACTIVE STATUS IS EXPECTED TO BE SECOND QUARTER 1981.

SINCE THE ABOVE LISTED FLIGHT ATTENDANTS ARE THOSE SYSTEM-WIDE FLIGHT ATTENDANTS WITH THE LEAST AMOUNT OF

SENIORITY THERE ARE NO ANTICIPATED DISPLACEMENT OPTIONS NOR ARE THERE ANY VACANCIES IN THE SYSTEM.

IN THE EVENT THAT LEAVES OF ABSENCE ARE REQUESTED FOR THE ANTICIPATED PERIOD OF THE FURLOUGH IN EQUIVALENT NUMBERS BY CATEGORY AND LOCATION WHERE THE FURLOUGH IS AFFECTED THE ACTUAL NUMBER OF FLIGHT ATTENDANTS BEING FURLOUGHED WILL BE REDUCED ACCORDINGLY.

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POST ON ALL FLIGHT ATTENDANT BULLETIN BOARDS IN ACCORDANCE WITH ARTICLE 12/A/ OF THE CURRENT WORKING AGREEMENT THE FOLLOWING BOSTON INTERNATIONAL CABIN ATTENDANTS ARE FURLOUGHED EFFECTIVE OCTOBER 31 1979. LAST DAY IN PRESENT STATUS WILL BE OCTOBER 30 1979.

SEN NO	PRN	NAME
6876	65656	RICH A
6857	46375	FRAGA M
6820	32080	QUEIROGA J
6805	65227	MILLOT J
6743	65108	TOMMARCHI G
6696	30576	AMARO P

IN ACCORDANCE WITH ARTICLE 12/B/ OF THE CURRENT WORKING AGREEMENT PERSONAL LEAVES OF ABSENCE ARE AVAILABLE TO

FLIGHT ATTENDANTS AT THE DOMICILE WHERE THE REDUCTIONS IN FORCE ARE OCCURRING. THE NUMBER OF LEAVES BY DOMICILE ARE AS FOLLOWS. . . . .

BOS-I	C/A	6
BOS-D	C/A	48
ORD-D	C/A	16

THE ANTICIPATED DURATION OF SUCH LEAVES OF ABSENCE AS WELL AS THE ANTICIPATED DURATION OF FURLOUGHS IS APPROXIMATELY 18 MONTHS. THE RECALL TO ACTIVE STATUS IS EXPECTED TO BE SECOND QUARTER 1981.

FOR PURPOSES OF ARTICLE 12/B/ AS IT RELATES TO DISPLACEMENT OPTIONS THE MOST JUNIOR FLIGHT ATTENDANT ON THE SYSTEM SENIORITY LIST IS PRESENTLY LOCATED AT THE ST. LOUIS DOMICILE ALL OF THE ABOVE LISTED FLIGHT ATTENDANTS WHO DO NO WISH TO ACCEPT FURLOUGH BUT RATHER EXPRESS A DESIRE TO EXERCISE DISPLACEMENT RIGHTS MAY DISPLACE TO THE ST. LOUIS DOMICILE. THERE WILL BE NO FURTHER DISPLACEMENTS OR FURLOUGHS OUT OF THE ST. LOUIS DOMICILE AS A RESULT OF SUCH DISPLACEMENT OPTIONS. YOUR ATTENTION IS DIRECTED TO ARTICLE 12/B/ OF THE CURRENT WORKING AGREEMENT WHICH STATES—QUOTE—YOU MUST SEND A TELEGRAM WITHIN SEVEN /7/ DAYS OF SUCH FURLOUGH NOTICE BEING ISSUED STATING YOUR DESIRE TO EITHER ACCEPT THE FURLOUGH OR INDICATE THE LOCATION AND CLASSIFICATIONS FOR WHICH YOU ARE WILLING TO ACCEPT AS A DISPLACEMENT OPTION. SUCH TELEGRAM SHALL BE ADDRESSED TO THE DIRECTOR IN-FLIGHT SERVICES BUDGETS AND CONTROLS—605 THIRD AVENUE—NEW YORK N.Y. 10016.—UNQUOTE

IN THE EVENT THAT LEAVES OF ABSENCE ARE REQUESTED FOR THE ANTICIPATED PRIOD OF THE FURLOUGH IN EQUIVALENT NUMBERS BY CATEGORY AND LOCATION WHERE THE FURLOUGH WILL BE AFFECTED THE ACTUAL NUMBER OF FLIGHT ATTENDANTS BEING FURLOUGHED WILL BE REDUCED ACCORDINGLY.

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NYCHA/DEWEY W.

POST ON ALL FLIGHT ATTENDANT BULLETIN BOARDS IN ACCORDANCE WITH ARTICLE 12/A/ OF THE CURRENT WORKING AGREEMENT THE FOLLOWING BOSTON DOMESTIC CABIN ATTENDANTS ARE FURLOUGHED EFFECTIVE OCTOBER 31 1979. LAST DAY IN PRESENT STATUS WILL BE OCTOBER 30 1979.

SEN NO	PRN	NAME
6817	65221	HAVENER S
6815	65210	PARKER S
6812	65224	KLINGE D
6811	65216	BEYL G
6804	65197	BRISKEY K
6803	65198	CLARK S
6801	65208	OBRIEN E
6797	65228	MNICH T
6796	65229	ONEILL L
6795	65236	SMITH M J
6793	65199	DIFATTA C
6792	65217	CAMPANA S

SEN NO	PRN	NAME
6790	65215	ANDERSON J
6788	62697	PERKINS T
6787	61540	GENECE J
6786	65077	GANGE J
6781	65076	DAVIS L
6778	65185	CURENTON M
6775	65085	HOWARD R
6774	65081	GREENE P
6773	65084	HOOD A
6772	65179	BRAYMAN K
6771	65074	BERUBE D
6767	65092	GOMEZ R
6766	65086	RICHARDSON A
6765	65187	HAKHAMANESHI A
6761	65194	OBRIEN S
6760	65181	CAMPO D
6758	65083	HILL M
6755	65191	KEATING D
6753	65196	TOWNSEND T
6751	64954	DAVID L
6750	63819	CASH L
6749	49036	GROWN M H
6727	64951	BURKE A
6724	64948	AZNAVOURIAN S
6720	64963	MODRCIN JR J
6717	64949	BARKER A
6714	64959	JEDDEH E
6713	64960	JOHNSON O
6712	64961	CARMODY T
6707	64968	WALLER W
6705	64952	BURNS K
6703	64962	MCDOWELL H
6702	64958	FIELDING Y
6701	64993	JENKINS N
6698	64967	SUMMITT M

IN ACCORDANCE WITH ARTICLE 12/B/ OF THE CURRENT WORKING AGREEMENT PERSONAL LEAVES OF ABSENCE ARE AVAILABLE TO FLIGHT ATTENDANTS AT THE DOMICILE WHERE THE REDUCTIONS IN FORCE ARE OCCURRING. THE NUMBER OF LEAVES BY DOMICILE ARE AS FOLLOWS. . . . .

BOS-I C/A 6
BOS-D C/A 48
ORD-D C/A 16

THE ANTICIPATED DURATION OF SUCH LEAVES OF ABSENCE AS WELL AS THE ANTICIPATED DURATION OF FURLOUGHS IS APPROXIMATELY 18 MONTHS. THE RECALL TO ACTIVE STATUS IS EXPECTED TO BE SECOND QUARTER 1981.

FOR PURPOSES OF ARTICLE 12/B/ AS IT RELATES TO DISPLACEMENT OPTIONS THE MOST JUNIOR FLIGHT ATTENDANT ON THE SYSTEM SENIORITY LIST IS PRESENTLY LOCATED AT THE ST. LOUIS DOMICILE ALL OF THE ABOVE LISTED FLIGHT ATTENDANTS WHO DO NOT WISH TO ACCEPT FURLOUGH BUT RATHER EXPRESS A DESIRE TO EXERCISE DISPLACEMENT RIGHTS MAY DISPLACE TO THE ST. LOUIS DOMICILE.

THERE WILL BE NO FURTHER DISPLACEMENTS OR FURLOUGHS OUT OF THE ST. LOUIS DOMICILE AS A RESULT OF SUCH DISPLACEMENT OPTIONS. YOUR ATTENTION IS DIRECTED TO ARTICLE 12/B/ OF THE CURRENT WORKING AGREEMENT WHICH STATES—QUOTE—YOU MUST SEND A TELEGRAM WITHIN SEVEN /7/ DAYS OF SUCH FURLOUGH NOTICE BEING ISSUED STATING YOUR DESIRE TO EITHER ACCEPT THE FURLOUGH OR INDICATE THE LOCATION AND CLASSIFICATIONS FOR WHICH YOU ARE WILLING TO ACCEPT AS A DISPLACEMENT OPTION. SUCH TELEGRAM SHALL BE ADDRESSED TO THE DIRECTOR IN-FLIGHT THIRD AVENUE—NEW YORK N.Y. 10016. SERVICES BUDGETS AND CONTROLS—605 —UNQUOTE

IN THE EVENT THAT LEAVES OF ABSENCE ARE REQUESTED FOR THE ANTICIPATED PERIOD OF THE FURLOUGH IN EQUIVALENT NUMBERS BY CATEGORY AND LOCATION WHERE THE FURLOUGH WILL BE AFFECTED THE ACTUAL NUMBER OF FLIGHT ATTENDANTS BEING FURLOUGHED WILL BE REDUCED ACCORDINGLY.

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NYCHA/DEWEY W.

POST ON FLIGHT ATTENDANT BULLETIN BOARDS IN ACCORDANCE WITH ARTICLE 12/A/ OF THE CURRENT WORKING AGREEMENT THE FOLLOWING CHICAGO DOMESTIC CABIN ATTENDANTS ARE FURLOUGHED EFFECTIVE OCTOBER 31, 1979. LAST DAY IN PRESENT STATUS WILL BE OCTOBER 30 1979.

SEN NO	PRN	NAME
6889	65628	BOLDYSH T
6888	65643	TIRRITO G
6886	65650	LUCCHESE K
6881	65640	PORTER K
6879	65633	KAMINSKI C
6877	65653	MURPHY B M
6875	65638	MITCHELL L
6872	65639	PANKEY T
6871	65663	NAYDOCK R
6870	65646	CAMACHO L
6868	65641	REISMAN J
6867	30734	ELION A

SEN NO	PRN	NAME
6863	65636	MANDOKIAN D
6861	65630	DEVLIN K
6859	65637	MATHISON J
6858	46980	METZ H

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IN ACCORDANCE WITH ARTICLE 12/B/ OF THE CURRENT WORKING AGREEMENT PERSONAL LEAVES OF ABSENCE ARE AVAILABLE TO FLIGHT ATTENDANTS AT THE DOMICILES WHERE THE REDUCTIONS IN FORCE ARE OCCURRING. THE NUMBER OF LEAVES BY DOMICILE ARE AS FOLLOWS. . .

BOS-I	C/A	6
BOS-D	C/A	48
ORD-D	C/A	16

THE ANTICIPATED DURATION OF SUCH LEAVES OF ABSENCE AS WELL AS THE ANTICIPATED DURATION OF FURLOUGH IS APPROXIMATELY 18 MONTHS. THE RECALL TO ACTIVE STATUS IS EXPECTED TO BE SECOND QUARTER 1981.

FOR PURPOSES OF ARTICLE 12/B/ AS IT RELATES TO DISPLACEMENT OPTIONS THE MOST JUNIOR FLIGHT ATTENDANT ON THE SYSTEM SENIORITY LIST IS PRESENTLY LOCATED AT THE ST. LOUIS DOMICILE. ALL OF THE ABOVE LISTED FLIGHT ATTENDANTS WHO DO NOT WISH TO ACCEPT FURLOUGH BUT RATHER EXPRESS A DESIRE TO EXERCISE DISPLACEMENT RIGHTS MAY DISPLACE TO THE ST. LOUIS DOMICILE. THERE WILL BE NO FURTHER DISPLACEMENTS OR FURLOUGHS OUT OF ST. LOUIS DOMICILE AS A RESULT OF SUCH DISPLACEMENT OPTIONS. YOUR ATTENTION IS DIRECTED TO ARTICLE 12/B/ OF THE CURRENT WORKING AGREEMENT WHICH STATES QUOTE—YOU MUST SEND A TELEGRAM WITHIN SEVEN /7/ DAYS OF SUCH FURLOUGH NOTICE BEING ISSUED STATING YOUR DESIRE

TO EITHER ACCEPT THE FURLOUGH OR INDICATE THE LOCATIONS AND CLASSIFICATIONS FOR WHICH YOU ARE WILLING TO ACCEPT AS A DISPLACEMENT OPTION. SUCH TELEGRAM SHALL BE ADDRESSED TO THE DIRECTOR IN-FLIGHT SERVICES BUDGETS AND CONTROLS—605 THIRD AVENUE—NEW YORK, N.Y. 10016.

IN THE EVENT THAT LEAVES OF ABSENCE ARE REQUESTED FOR THE ANTICIPATED PERIOD OF THE FURLOUGH IN EQUIVALENT NUMBERS BY CATEGORY AND LOCATION WHERE THE FURLOUGH WILL BE AFFECTED THE ACTUAL NUMBER OF FLIGHT ATTENDANTS BEING FURLOUGHED WILL BE REDUCED ACCORDINGLY.

• • • •

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
Washington, D.C. 20543

May 18, 1981

James A. Velde, Esquire
One First National Plaza
Chicago, Illinois 60603

Re: Anne B. Zipes, et al. v. Trans World Airlines, Inc., No. 78-1545; Trans World Airlines, Inc. v. Anne B. Zipes, et al., No. 78-1549; Independent Federation of Flight Attendants v. Trans World Airlines, Inc. and Anne B. Zipes, et al., No. 80-951.

Dear Mr. Velde:

The Court today entered the following order in the above-entitled cases:

"TWA's motion to limit review in No. 80-951, *Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc., et al.*, to the order of the District Court entitled "Order Awarding Seniority" and thereafter to dismiss No. 78-1545, *Zipes, et al.* v. *Trans World Airlines, Inc.*, and No. 78-1549, *Trans World Airlines, Inc.* v. *Zipes, et al.*, as moot, is denied.

"The motion filed by petitioners in No. 78-1545 (the 'plaintiff class'), requesting that the Court (1) grant TWA's motion; or (2) order TWA and the plaintiff class to stipulate to dismissal of the writs in No. 78-1545 and No. 78-1549; or (3) dismiss No. 78-1545 and No. 78-1549 as moot, is denied.

"No. 78-1549 is removed from the argument calendar, and further consideration of the case is de-

ferred. The writ of certiorari in No. 80-951 is limited to Questions 1 and 2 presented by the petition for a writ of certiorari and is otherwise dismissed as improvidently granted.

"Justice Stevens took no part in the consideration or decision of these motions."

Very truly yours,

/s/ Alexander L. Stevas
ALEXANDER L. STEVAS
Clerk

cc: Counsel of Record

Supreme Court, U. S.
FILED
MAY 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1545

ANN ZIPES, PAT SANTINI and PAMELA DAILING, INDIVIDUALLY AND ON BEHALF OF A CLASS,
Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,
Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JAMES A. VELDE,
One First National Plaza,
Chicago, Illinois 60603,
Attorney for Respondent.

Of Counsel:
LAURENCE A. CARTON,
GARDNER, CARTON & DOUGLAS.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1545

ANN ZIPES, PAT SANTINI and PAMELA DAILING, INDIVIDUALLY AND ON BEHALF OF A CLASS,

Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondent has filed a cross-petition for certiorari, docketed as No. 78-1549, which is conditioned upon the grant of certiorari in this case, Docket No. 78-1545 (See pp. 1 and 6-7 of cross-petition in No. 78-1549).

SUPPLEMENTAL STATEMENT OF THE CASE.

Petitioners' Statement of the Case is materially inaccurate.

The class members were described in the complaint, petitioners say, "as including all TWA hostesses who had been

fired on account of parenthood after July 2, 1965."[1] Petitioners omit the currently employed flight attendants from the class. The omission is significant because of their next statement that respondent's answer "explicitly admitted that the Court had jurisdiction." The admission did not apply to class members who had failed to comply with the jurisdictional prerequisites of time limit compliance of Title VII of the Civil Rights Act of 1964. The largest class of members—several thousand currently employed flight attendants—had complied with the time limit since they had not been terminated for pregnancy but were working and potentially subject to the allegedly illegal practice at the time the EEOC charges were filed. The admission of subject matter jurisdiction under § 706(f) of Title VII thus applied to them, but not to all class members.

Contrary to petitioners' statement that respondent "made no assertion of any time-filing defense," respondent's answer put in issue the failure of class members to comply with the requirement for filing charges with the EEOC. The complaint alleged[2] that the plaintiff union filed a charge of illegal discrimination with the EEOC on June 1, 1970. Respondent's answer alleged

1. However, the class description was "all female flight cabin attendants similarly situated currently employed by Defendant and/or employed by Defendant at any time since July 2, 1965" (I Supp. 8). Class members were not alleged to have been terminated "on account of parenthood" but "when such female persons . . . became pregnant" (I Supp. 9). This inaccuracy, though not material in this Docket No. 78-1545, is important in Docket No. 78-1549, as is petitioners' incorrect reference (p. 3) to "respondent's male flight cabin attendants." There were none in 1970, as explained in respondent's cross petition (pp. 8-10) in Docket No. 78-1549.

2. Complaint: "11. On or about June 1, 1970, the Plaintiff Union filed a charge with the Equal Employment Opportunity Commission (hereinafter referred to as the EEOC) alleging the aforesaid unfair employment practices. The EEOC notified the Plaintiff Union on July 31, 1970, that it was entitled to initiate a civil action in a United States District Court, as provided in 42 U. S. C. 2000e-5(e) and (f). The Plaintiff Union has its offices in the State of Illinois. Illinois does not have a law prohibiting the unlawful employment practices complained of herein." (I Supp. 10.)

it had no knowledge or information sufficient to form a belief as to the truth of this allegation.[3]

Petitioners' statement, with a quotation from the transcript (Petition A-28), that respondent's lawyer "explicitly waived any question of the statute of limitations" at the settlement hearing in March 1972 ignores the fact that the waiver was conditioned upon the approval of the settlement. Petitioners' quotation omits two immediately preceding paragraphs of the transcript explaining that the time limit would be raised if there were no settlement.[4]

Petitioners' statement that respondent "made no mention of any jurisdictional question" during the appeal from the settlement approval mistakenly assumes that a time limit is not jurisdictional. The briefs (Seventh Circuit Court of Appeals Nos. 72-1335, 1336, 1339, 1503) discussed the Title VII time limit as an obstacle to recovery if the settlement were overturned and the case were to be litigated. See Brief for Defendants-Appellees (pp. 62-64); Brief of Appellee ALSSA (p. 42). Petitioners themselves (Reply Brief of Appellants pp. 25-28) discussed the issue, arguing (p. 28) that time limit noncompliance was an affirmative defense that defendant had not pleaded.

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3. Answer: "11. Defendant admits the allegations of paragraph 11, except that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 that on or about June 1, 1970, plaintiff union filed a charge with the EEOC alleging unfair employment practices, and that the EEOC notified plaintiff union on July 31, 1970, that it was entitled to initiate a civil action in a United States District Court." (I Supp. 20.)

4. "Mr. Carr: All of these girls, as I say, want to go back to work, and here are girls as to whom there is a great deal of doubt, as to whether or not—Mr. Feldman has estimated that 90 per cent would [not] have a right to go back to work, and incidentally, we have been prepared, if we ever got to the issue, to raise these points on the particular girls.

"Many of these girls have slept for five or six years on their rights, without ever doing anything about them. Mr. Feldman said there is a question as to 90 per cent of them having a right to go back to work." (II Supp. 471.)

After the case was remanded following this Court's denial of review in May 1974, defendant moved to amend its answer to plead noncompliance with the time limit as an affirmative defense. This was done in September 1974 at the first status call after the remand. Petitioners' Statement of the Case says of this amendment, "TWA first presented its defense under § 706(d) in the form of a motion for leave to amend its answer." On the contrary, respondent's answer in September 1970, by pleading no knowledge, denied petitioners' allegation of the filing of the charge with the EEOC, as noted above.

REASONS FOR DENYING WRIT.

The single issue presented by the certiorari petition is whether the Title VII time limit is subject to waiver and estoppel. But the waiver and estoppel argued by petitioners are disproved by facts their petition omits, as explained in Point I of this answer. The "conflict in the circuits" on this issue, asserted by petitioners, is not relevant in this case, as explained in Point II.

I.

Record Disproves Waiver and Estoppel.

A. No Excuse for Noncompliance with Filing Requirement.

The number of allegedly illegal terminations of approximately 400 petitioners occurred during years as follows:[5]

1965 (after July 2)	30
1966	76
1967	78
1968	112
1969	88
1970 (before March 1)	2

Although these petitioners seek years of backpay under paragraph (g) of § 706 of Title VII, they neglected until May 31,

5. Compiled from III Supp. 89-98.

1970 to file the EEOC charges which paragraph (d) required them to file within ninety days "after the alleged unlawful employment practice occurred."

Petitioners have never attempted to excuse their failure to file EEOC charges until May 31, 1970. Their neglect is emphasized by unusual affirmative evidence. In March 1972 their then counsel, referring to the Spring of 1970, conceded that the class members "had never made any protest to the Union or, as far as I know, to anybody else about their discharges" (II Supp. 319, 328, 336).

Each of the claims, estimated by petitioners' counsel in 1972 to average $7,500 per year (II Supp. 295), involves the adjudication of many factual details under § 706(g), as whether termination was for a non-discriminatory reason, whether work was discontinued for family reasons, the amounts earned or "earnable with reasonable diligence" after termination, etc. Petitioners' years of neglect make this a classic case for denying recovery under the centuries-old maxim, "the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."[6]

The facts of petitioners' noncompliance differentiate the decisions they cite in which equitable considerations were held to toll the time limit. In *Reeb* v. *Economic Opportunity Atlanta Inc.*, 516 F. 2d 924, 930 (5th Cir. 1975), the employer, by misrepresenting the facts that created the claim, misled the employee into not filing the charge in time. In *Dartt* v. *Shell Oil Company*, 539 F. 2d 1256, 1261-2 (10th Cir. 1977), affirmed by an equally divided court, 434 U. S. 99 (1977),

6. Language of 1540 English statute quoted in *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 428 (1965). Similar language of the *Burnett* opinion was mentioned in the Title VII case of *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229, 238 (1976). Time limits are "practical and pragmatic devices to spare the courts from litigation of stale claims" and the defendant "from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Securities Corp* v. *Donaldson*, 325 U. S. 304, 314 (1945).

where equitable considerations were held to have tolled the time limit of the Age Discrimination in Employment Act, the employee's filing delay was traceable to the employer's delay in giving information to the Labor Department. There were similar excuses for the employees' delays in other ADEA decisions cited (p. 6) by petitioners.[7]

B. No Implied Waiver in Pleading.

If compliance with the Title VII time limits is a prerequisite of jurisdiction of the subject matter, the petitioners as plaintiffs had a duty to plead compliance since Rule 8(a)(1) of the Federal Rules of Civil Procedure requires the complaint to state "the grounds upon which the court's jurisdiction depends." The respondent as defendant would not have waived it by not pleading it nor by an express concession.[8] The strength of this principle is illustrated by the exclusion of class members whose non-compliance with the Title VII time limit was *raised for the first time on appeal. Wetzel* v. *Liberty Mutual Ins. Co.*, 508

7. In *Kephart* v. *Institute of Gas Technology*, 581 F. 2d 1287 (7th Cir. 1978), where the employer had failed to post required notices of the existence of the act, the time limit was held to begin when the employee employed an attorney or had actual knowledge of his rights. There were similar facts in *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187 (3rd Cir. 1977), as well as discussions with the employer about other work that misled the plaintiff about his discharge. *Ott* v. *Midland-Ross Corp.*, 523 F. 2d 1367, 1370 (6th Cir. 1975), held an employer-induced excuse for non-compliance with the time limit was adequately pleaded by an allegation that the plaintiff was "fraudulently induced" not to assert his rights.

8. Lack of jurisdiction over the subject matter is not one of many matters (as statute of limitations) which Rule 8(c) directs to be "set forth affirmatively" in an answer nor which Rule 8(d) says "are admitted when not denied" in a required responsive pleading. Rule 12(b) provides that lack of jurisdiction over the subject matter, as six other listed matters, may be raised in the answer or by a motion made before pleading. But, after providing that some of the listed matters are waived unless pleaded and others may be raised later, a special provision of Rule 12(h)(3) states, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

F. 2d 239, 248 n8 (3rd Cir. 1975). This Court denied a petition for certiorari in which waiver of the time limit was the sole issue sought to be reviewed. 421 U. S. 1011. In the present case, although the time limit requirement would not have been waived by not pleading it, noncompliance was an issue in the case from the beginning so that respondent never waived it, whether or not it is jurisdictional.

Compliance with the requirement for filing the EEOC charge was made an issue by respondent's answer in September 1970. The complaint alleged that on or about June 1, 1970 the plaintiff union had filed the EEOC charge (quoted above, footnote 2). Respondent's answer stated it was without knowledge or information sufficient to form a belief of this allegation (quoted above, footnote 3). This statement in the answer had the effect of a denial.[9] Issue was thus joined in 1970 on whether the petitioners had complied with the filing requirements of Title VII. Petitioners' contention of waiver by not pleading is thus without any basis, whether or not the time limit is jurisdictional.[10]

Petitioners' failure to comply with the time limit was a substantial reason for the 1971 settlement agreement which, if approved, would have given them prompt reinstatement but no backpay. At the hearing on the settlement in March 1972, as noted above, the then counsel for petitioners related how over 90% of the flight attendants (TWA and American Airlines' employees) terminated for pregnancy had made no protest about their discharge (II Supp. 319, 328, 335-6, 422, 455). Petitioners' present counsel, then representing objectors, discussed the number of class members affected by the Title VII time limit (Id. 422-3, 484). The issue of time limit compliance was

9. Rule 8(b), Federal Rules of Civil Procedure, provides that, if a party "is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial."

10. The Court of Appeals' statement that the respondent "failed to raise this issue in the pleadings" (A. 15) is correct only if it means that the respondent did not plead noncompliance as an "affirmative defense."

also discussed in the Court of Appeals briefs on the appeal from the order approving the settlement (See above, p. 3). Petitioners, opposing the settlement, argued that time limit noncompliance had to be pleaded by the defendant as an "affirmative" defense.

Accordingly, after the remand and at the first status call in September 1974, respondent took the precaution of a motion to amend the answer to plead noncompliance as an affirmative defense (III Supp. 25). The amendment, allowed in November 1974 (III Supp. 37), was clearly reasonable under the liberal practice for amending pleadings provided by Rule 15(a) of the Federal Rules of Civil Procedure. *Foman* v. *Davis,* 371 U. S. 178, 182 (1962). See *Emich* v. *General Motors,* 229 F. 2d 714 (1956), permitting a defendant to plead noncompliance with a time limit after remand for a new trial. Further, since the filing requirement had been raised in the answer and was involved in the settlement proceedings, the amendment was authorized by Rule 15(b)'s permission to plead by amendment, even after judgment, issues that had been tried but not pleaded.

The amendment did not possibly prejudice the petitioners. Their failure to comply with the time limit had occurred long before the suit was filed in 1970. The time limit issue had been known to petitioners' lawyers from the beginning of the case, as shown by the orginal pleadings and the settlement proceedings. Petitioners had not done anything in reliance on the fact that respondent's answer, though denying compliance with the filing requirement, had not pleaded it as an "affirmative" defense. Petitioners' attack on the pleading of noncompliance as an affirmative defense in the September 1974 amendment is too formalistic to warrant this Court's consideration.

Thus, since noncompliance with the filing requirement was pleaded twice over by the respondent and debated at the contested hearing on settlement approval by petitioners' present counsel, there is no basis for petitioners' contention that respondent waived it by failure to plead.

C. No Express Waiver nor Estoppel in Settlement Proceeding.

Petitioners' claims of waiver and estoppel mean that respondent, from the beginning of the litigation, had an improbable scheme to mislead them and the courts about the jurisdictional filing requirement of Title VII. The scheme, as petitioners picture it, was for respondent to conceal its intention of raising the requirement; to make an "explicit open-court waiver" and submit a settlement approval order that recited subject-matter jurisdiction; thus, in some way, to induce petitioners to appeal and overturn the settlement; and then, after disapproval, to destroy petitioners' Title VII remedies by raising the requirement. Their appeal did result in rejection of the settlement by the Seventh Circuit. *ALSSA* v. *American Airlines, Inc.*, 490 F. 2d 636 (1973), *cert. den.* 416 U. S. 993 (1974). But the record supports nothing else in petitioners' claims of waiver and estoppel. Their claims are *disproved* by facts they omit.

For the claimed express waiver, petitioners rely on the statement of respondent's counsel, "That is correct," when the judge asked him, "In other words, you are waiving any question of statute of limitations, if there is one?" This was said in the course of an explanation of the terms of the settlement (II Supp. 471-2). Petitioners' quotation (A. 28) of this and further remarks from the transcript are clarified by the two paragraphs omitted by petitioners (quoted above, footnote 4). Respondent's counsel explained that respondent was willing to settle the case, permitting all class members to return to work despite time limit noncompliance. But he also explained that, without the settlement, respondent would raise the issue of noncompliance against the 90 per cent of them whose right to go back to work was questionable.

The record proves that the customary recital of subject matter jurisdiction in the settlement approval order of March 17, 1972 could not have misled petitioners to their detriment. Again it is

significant that, at the hearing on approval of the settlement on March 13, petitioners' non-compliance with the time limit was discussed at length as a reasonable ground for the settlement (II Supp. 319, 328, 335-6, 442-3, 455, 471, 484). On March 20 a report to class members (the present petitioners) from their counsel stated that the time limit might prevent any recovery if the settlement order were reversed on appeal.[11] With these warnings to petitioners, not mentioned in the certiorari petition, respondent could not be charged with misleading them into appealing and obtaining disapproval of a settlement agreement which would have given them a remedy despite noncompliance with the time limit.

Petitioners' attempt to use concessions in the settlement proceedings to excuse their non-compliance with the time limit is contrary to the terms of the settlement,[12] to the evidence rule that statements made in settlement negotiations are not admissible,[13] and to the strong public policy favoring settlements.[14]

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11. Appendix of Appellants, Appeal No. 72-1335, pp. 72-9, Court of Appeals for Seventh Circuit, after referring to the 90-day time limit of Title VII, stated that "the claims of practically the entire class might be held to be untimely and barred in their entirety."

12. The settlement agreement provided it would be void if not approved by final judgment (I Supp. 36); that TWA's acceptance of it should not be construed as an admission; and that the terms of the settlement should not be offered nor received in evidence in any proceeding as an admission against the defendant (*id.* 34). Any statement about the time limit, as all other matters waived, was a "hypothetical or provisional concession conditioned upon the settlement's completion". Cf. *Hiram Ricker & Sons* v. *Students Intern. Soc.*, 501 F. 2d 550, 553 (1st Cir. 1974).

13. Rule 408 of the Federal Rules of Evidence (28 U. S. C. A., Fed. Rules of Ev. 161) states, "Evidence of conduct or statements made in compromise negotiations is . . . not admissible". The reason for the rule, stated in the Advisory Committee notes, is "promotion of the public policy favoring the compromise and settlement of disputes" (*id.* 163).

14. An unusually strong public policy favors the settlement of such large class actions as the one here. The opinion on the first appeal in this case noted, citing cases, that in Title VII cases there

(Footnote continued on next page.)

If the settlement had been sustained on appeal, respondent would have been precluded from setting it aside for the class members' noncompliance with the time limit, whether or not jurisdictional. With the settlement overturned, the settlement concessions became void.

These circumstances crucially differentiate the cases on which petitioners rely for equitable circumstances that would estop the respondent from asserting the time limit. In *Laffey* v. *Northwest Airlines*, 567 F. 2d 429 (D. C. Cir. 1976), cert. den. 434 U. S. 1086 (1978), the defendant did not raise the Title VII time limit until the plaintiffs, not knowing of the time limit obstacle, lost their rights under the Equal Pay Act. *Alger* v. *Hayes*, 452 F. 2d 841 (8th Cir. 1971), did not involve subject-matter jurisdiction as plaintiffs represent, but jurisdiction of the person of the defendant (see 452 F. 2d at 843), which is readily waived by a mere appearance. The statement in the opinion that the defendant had played "fast and loose" with the court was based on defendant's attack on service of summons on appeal when he had represented before trial that a verdict would be paid. In *DiFrischia* v. *New York Central Railroad*, 279 F. 2d 141 (3rd Cir. 1960), a defendant was estopped to attack diversity jurisdiction after the time limit had expired because he had stipulated to the factual basis of diversity during the time limit.[15]

The Court of Appeals, while stating that the *Alger* and *DiFrischia* cases did not involve jurisdictional time limits, referred to the differentiating facts relied on to prove estoppel (A16-7). The Court of Appeals implied that the facts in the

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(Footnote continued from preceding page.)
is great emphasis on private settlement and the elimination of unfair practices without litigation. *ALSSA* v. *American Airlines*, 455 F. 2d 101, 109 (1972).

15. The case has been limited as a precedent by this crucial fact. See *Stapleton* v. *United States*, 454 F. 2d 1210 (3rd Cir. 1972) *cert. denied*, 409 U. S. 894; *Joyce* v. *United States*, 474 F. 2d 215, 218 n. 1 (3rd Cir. 1973); *Travis Mills Corp.* v. *Square D Co.*, 67 F. R. D. 22, 24-27 (E. D. Pa. 1975), which contains a full analysis of the cases.

present case did not prove the estoppel claimed by the petitioners.

The record thus disproves the factual basis of petitioners' waiver and estoppel claims so completely that (1) the lower courts were right in rejecting them and (2) the remand they request could not develop facts to support them. Further, petitioners' use of settlement concessions as a basis for estoppel and waiver is contrary to elementary legal principles.

II.

Conflict in Circuits Not Significant.

The Court of Appeals' opinion, after discussing petitioners' other time limit contentions, rejected (A15-17) their arguments that respondent had waived petitioners' noncompliance and was estopped to raise the requirement by delays in doing so. The opinion stated that the 90-day filing period is jurisdictional and therefore failure to raise it "does not constitute a waiver, nor is the employer estopped from raising it." For the jurisdictional nature of the requirement, the opinion cited decisions of this Court, Seventh Circuit decisions, and, saying that other circuits "are split on this issue," decisions of the District of Columbia and Tenth, Third, Fifth, and Eighth Circuits. The petition for certiorari cites District of Columbia and Fifth Circuit cases as on one side and Seventh and Eighth Circuit cases on the other. The petition also cites cases for a statement that the time limit in the ADEA is not jurisdictional. But the holdings in the cases cited by petitioners and the Court of Appeals are not contrary to the decision here.

This Court,[16] many Courts of Appeals,[17] and District Courts too numerous to mention have stated clearly that the two Title

16. *Alexander* v. *Gardner-Denver*, 415 U. S. 36, 47 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973); *Electrical Workers* v. *Robbins & Myers*, 429 U. S. 229, 239-40 (1976); *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 555 (1977).

17. *Terry* v. *Bridgeport Brass Co.*, 519 F. 2d 806, 808 (1975); *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811 (1972); *Choate* v.

(Footnote continued on next page.)

VII time limits are jurisdictional prerequisites. The time limits in the NLRA and the ADEA are not analogous, as petitioners contend. There was no time limit in the NLRA when it was enacted in 1935. It was the Taft-Hartley Act in 1947 that first provided that the board should not issue a complaint on any unfair labor practice occurring more than six months before filing the charge. See *NLRB* v. *Local 264*, 529 F. 2d 778, 782-3 (8th Cir. 1976). Compliance with the time limit was not a condition of subject matter jurisdiction since the original act provided for the remedy without the time limit. Differences between the ADEA and Title VII that would account for treating the filing requirements of the former as jurisdictional prerequisites, but not those of the latter, are explained in *Gabriele* v. *Chrysler Corp.*, 573 F. 2d 949, 951-4 (6th Cir. 1978). Further, when the ADEA was amended by lengthening the time limits, they were expressly stated in Congress to be non-jurisdictional, as explained in *Kephart* v. *Institute of Gas Technology*, 581 F. 2d 1287, 1289 (7th Cir. 1978). Nothing similar occurred when the Title VII time limits were amended in 1972. See below, footnote 19.

Despite petitioners' contrary statements (pp. 7-9), the legislative history is significant, showing that Congress wished to protect the federal courts from the expected flood of claimants who had not complied with the Title VII time limits. The mere enactment of the unusually brief time limits in Title VII is evidence of a strong congressional purpose to restrict Title VII

(Footnote continued from preceding page.)

Caterpillar Tractor Co., 402 F. 2d 357 (1968); *Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F. 2d 239 (3rd Cir. 1975), *cert. denied*, 421 U. S. 1011 (1975); *Griffin* v. *Pacific Maritime Assoc.*, 478 F. 2d 1118 (9th Cir. 1973), *cert. denied*, 414 U. S. 859; *East* v. *Romine, Inc.*, 518 F. 2d 332, 336 (5th Cir. 1975); *Goodman* v. *City Products Corp.*, 425 F. 2d 702, 709 (6th Cir. 1970); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228, 1231 (8th Cir. 1975); *Hinton* v. *CPC International*, 520 F. 2d 1312, 1315 (C. A. 8, 1975); *Revere* v. *Tidewater Tel. Co.*, 485 F. 2d 684 (4th Cir. 1973); *Stebbins* v. *Continental Ins. Co.*, 442 F. 2d 843 (D. C. Cir. 1971); *Vigil* v. *American Tel. & Tel. Co.*, 455 F. 2d 1222 (10th Cir. 1972).

remedies. The time limits, progressively more restrictive with changing versions of the legislation, emphasize that Congress intended to draw a firm line that would permit only the diligent claimant to recover.[18] Under the 1972 amendments to the 1964 Act, extending the periods for filing the EEOC charge from 90 to 180 days and for the court action from 30 to 90 days, the time limits remain relatively short.[19]

Despite differences in language, the principles of law applied on both sides of the asserted "split in the circuits" are substantially the same.

Reeb v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924 (5th Cir. 1975), is a leading case, cited both by the petitioners and the Court of Appeals as holding the time limit not to be jurisdictional. But the *Reeb* opinion implied that the time limit was jurisdictional for some purposes. After mentioning Courts of Appeals' decisions, the opinion (p. 928) stated a "conclusion" that the 90-day time limit of Title VII

> "is not jurisdictional in *the sense that* compliance with it *vel non* determines the jurisdiction of the district court, *without respect to any of the other circumstances in a particular case*. We accept the view that the requirement

18. The original bill that later became Title VII in 1964 provided a six months period after an unlawful practice for filing the charge with the EEOC although a one-year provision had been included in otherwise identical language in a 1962 bill in the House (EEOC, Legislative History of Title VII and XI of the Civil Rights Act of 1964, pp. 2012, 2167). A later so-called "leadership compromise" between Senators Dirksen and Mansfield, which took away the EEOC's power to file suit, reduced the time limit from six months to the final provision of 90 days for the employee's EEOC charge and 30 days for the District Court action (*Id.* 3018). In *Moore* v. *Sunbeam Corporation*, 459 F. 2d 811, 821 (C. A. 7, 1972), Judge Stevens referred to the "extremely short limitations period on private claims" as a part of the Dirksen-Mansfield compromise that made it possible to enact the statute.

19. The Congressional discussion of the 1972 amendments indicates a serious concern about the congestion of cases in the EEOC as well as in the federal courts. Legislative History of Equal Employment Opportunity Act of 1972, Senate Committee on Labor and Public Welfare (pp. 63, 1505-16, 1528-32).

> should be *analogized to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them should also be applied here*".

The opinion referred elsewhere to

> "Our view that the ninety day requirement is not jurisdictional *in the strict sense of the term*" (p. 928)

and stated that this Court (as in *Love* v. *Pullman Co.*, 404 U. S. 522, 1972) and the Fifth Circuit "have not treated time limitations contained in Title VII . . . as *inflexible jurisdictional absolutes*" (p. 929).*

In another case cited by petitioners and the Court of Appeals to show a conflict in the circuits, *Laffey* v. *Northwest Airlines, Inc.*, 567 F. 2d 429 (D. C. Cir. 1976), *cert. den.* 434 U. S. 1086 (1978), the jurisdictional prerequisite of the time limit, though stated, was modified for some purposes. The opinion explained that the Supreme Court and Courts of Appeals "like most others—have referred to the timely-filing requirement as a jurisdictional prerequisite" (p. 474), but that "neither has ever had occasion to focus on the question whether courts are precluded from invoking traditional equitable doctrine to modify the requirement." The holding was stated to be (p. 475) that the 90-day provision for filing the charges "is not a jurisdictional absolute." The court then proceeded to find from the facts that the defendant was estopped (See above p. 11).

The language of the *Reeb* and *Laffey* opinions thus shows petitioners are wrong when they say (p. 6), as a necessary step in their argument of circuit conflict, that in those cases "the Fifth and District of Columbia Circuits ruled that the § 706(d) requirement is a 'statute of limitations' rather than a 'jurisdictional prerequisite.' " The opinions did not declare the Title VII time limits to be no more than a "statute of limitations." They called them "analogous to a statute of limitations" and said they

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* The italics in the *Reeb* quotations are added.

were not "strict jurisdictional absolutes" and so could be tolled or modified for equitable reasons.

Petitioners are wrong again when they treat the distinction between a statute of limitations and a jurisdictional prerequisite as an either-or difference which is open in the Second Circuit[20] and which has been held invariably jurisdictional in the Eighth Circuit.[21] The Eighth Circuit, as shown in the footnote, has cited with approval the Fifth Circuit's *Reeb* decision, which petitioners say is on the other side of the claimed circuit conflict. Yet after *Reeb* the Fifth Circuit in *East* v. *Romine*, 518 F. 2d 332, 336-7 (1975), reiterated the jurisdictional nature of the filing requirement, but as in the Eighth Circuit dismissed the complaint for noncompliance because the equitable considerations of *Reeb* were not present. And the Fifth Circuit recently stated that the filing requirement of Title VII was a jurisdictional prerequisite. *Green* v. *Forney Engineering Co.*, 19 EPD ¶ 9007 (Feb. 1979).

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20. *Smith* v. *American President Lines, Inc.*, 571 F. 2d 102, 109 (2nd Cir. 1978), noted that this Court in *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229, 237 n. 10 (1976), had denominated the Title VII time limit as jurisdictional but had none-the-less distinguished the case "from instances of a party being prevented from asserting his rights." This was said to open the possibility that "in certain situations tolling of the Title VII time limits might be acceptable". The opinion concluded that, if tolling is permissible, "the circumstances here . . . fall far short of the equitable considerations which would prompt our interference with the Title VII time limitations provided by Congress". (p. 109.)

21. In *Hinton* v. *CPC International, Inc.*, 520 F. 2d 1312, 1315 (8th Cir. 1975), where the time limit for filing the court action had been extended by agreement, the time limit was said to be jurisdictional and not extendable. But the opinion explained that the plaintiff had "failed to comply with the filing period extensions agreed to" (1315 n. 7) and the complaint was dismissed. Plaintiffs cite this case to show a conflict between the Eighth and Fifth Circuits, citing *Reeb* for the Fifth. But in *Wells* v. *Sherwood Medical Industries*, 549 F. 2d 1170 (1977), the Eighth Circuit, in an opinion by Judge Heany, who was on the *Hinton* court, said the filing time was jurisdictional but should be interpreted in accord with the "broad remedial purposes" of Title VII. For this the Eighth Circuit's opinion cited the Fifth Circuit's *Reeb*, which petitioners say conflicts with the Eighth Circuit.

Thus, although some passages in federal court opinions (as in the petition for certiorari) have spoken of the Title VII requirement as if it had to be labeled either "statute of limitations" or "jurisdictional prerequisite", the holdings show that the labels are an oversimplification. Any statute that limits the time for commencing litigation is in a sense a statute of limitations, the common example being the general limitation acts that apply everywhere to common law causes of action. If a statute creating a remedy imposes a specific time limit for filing the action, compliance with the time limit may be intended to be a prerequisite to the court's jurisdiction. As noted above, this Court and the other federal courts have repeatedly stated that the filing of an EEOC charge, within a stated time limit after the occurrence of the alleged illegal practice, and the receipt of a right-to-sue letter, within a stated time before the federal court action is brought, are jurisdictional prerequisites of the court action. But whether the time limit is called "statute of limitations" or "jurisdictional prerequisite", the federal courts modify the requirement by reason of equitable considerations [*The Harrisburg*, 119 U. S. 199, 214 (1886)], fraudulent concealment [*Holmberg* v. *Armbrecht*, 327 U. S. 392, 397 (1945)], or estoppel [*Glus* v. *Brooklyn Eastern Terminal*, 359 U. S. 231, 234-5 (1959)].

In the present case the Court of Appeals stated that the filing requirement is a jurisdictional prerequisite and therefore the employer is not estopped from raising it (A. 16). But the opinion then mentioned the facts relied on by petitioners for waiver and estoppel. The court said it was "questionable whether any concessions made at a settlement hearing should be held to constitute a waiver when the settlement is subsequently overturned." The court also differentiated the estoppel decisions cited by petitioners as involving a situation in which the defendant filed a stipulation admitting jurisdiction and then, after the statute of limitations had run, raised the issue of lack of jurisdiction (A. 17). The opinion, while indicating equitable considera-

tions were not controlling since the requirement was jurisdictional, nevertheless described the facts in such a way as to show the court's belief that there were in fact no equitable considerations to estop the respondent.

Thus the Courts of Appeals, despite the imprecise legal theories stated in some opinions, have taken equitable considerations into account in deciding whether the Title VII filing requirements would be applied as jurisdictional prerequisites. The requirements remain jurisdictional for someone who has no equitable excuse for noncompliance. The Court of Appeals' opinion in this case is consistent with this result. So are the holdings and much of the discussion in *Reeb* and *Laffey* which, refusing to apply the requirement as an inflexible jurisdictional absolute in the face of equitable considerations, imply that it otherwise remains a jurisdictional prerequisite. The asserted conflict in the circuits amounts at most to inconsistent language and not the substantial difference in holdings that warrants review under this Court's Rule 19(1)(b).

CONCLUSION.

If certiorari were granted as prayed by petitioners in this Docket No. 78-1545, the issue they raise would not have to be decided. For the record clearly disproves the facts of the waiver and estoppel by which they seek to excuse their failure to comply with the Title VII filing requirement. Further, the legal principles actually applied in the circuits are not in conflict despite the inconsistent language of some opinions.

Respondent urges denial of the certiorari petition so that this litigation, begun in 1970, may proceed to prompt disposition

in the District Court, as explained in respondent's conditional cross-petition for certiorari in Docket No. 78-1549.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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ANNE B. ZIPES, et al.,

Petitioners

vs. No. 78-1545

TRANS WORLD AIRLINES, INC.,

Respondent,

TRANS WORLD AIRLINES, INC.,

Cross-Petitioner,

vs. No. 78-1549

ANNE B. ZIPES, et al.,

Respondents,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

vs. No. 80-951

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION BY TRANS WORLD AIRLINES, INC. TO LIMIT REVIEW IN NO. 80-951 TO ISSUE OF SENIORITY AND TREAT NOS. 78-1545 AND 78-1549 AS MOOT

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PETITION FOR CERTIORARI IN NO. 78-1545 FILED APRIL 10, 1979, IN NO. 78-1549 ON APRIL 11, 1979, AND IN NO. 80-951 ON DECEMBER 12, 1980. ALL

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MOTION BY TRANS WORLD AIRLINES, INC. TO LIMIT REVIEW IN NO. 80-951 TO ISSUE OF SENIORITY AND TREAT NOS. 78-1545 AND 78-1549 AS MOOT.

Objects of Motion

The grant of certiorari on March 9, 1981 in the three captioned cases,[1] then also consolidated, was without limitation of the varied issues raised by the petitions. Trans World Airlines, Inc.,[2] respondent in Nos. 80-951 and 78-1545 and petitioner in No. 78-1549, *moves the Court to limit review in No. 80-951 to the order of the district court entitled "Order Awarding Seniority"*. The limitation would preclude review of, and make final, the district court order entitled "Order Approving Settlement and Dismissing Actions". The settlement order is copied in Appendix A to this motion (p. 1a), and the seniority order in Appendix B (p. 3a). The contentions of the union petitioner in No. 80-951 against the settlement order apply also to the seniority order, as this motion explains. Thus review of the

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[1] In No. 78-1545 the plaintiffs in a class action under Title VII of the Civil Rights Act of 1964 sought reversal of a court of appeals' decision that many class members had failed to comply with a Title VII time limit, held to be jurisdictional. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142 (7th Cir. 1978)

In No. 78-1549 Trans World Airlines, Inc., defendant in the same class action, sought by a Cross-Petition, conditional on a certiorari grant in No. 78-1545, to reverse the court of appeals' holding that TWA's practice of terminating flight attendants on pregnancy during 1965-70 was unlawful sex discrimination under Title VII.

In No. 80-951 the union representing current flight attendants, an intervenor in the trial court, sought reversal of a court of appeals' decision affirming two trial court orders. One, "Order Approving Settlement and Dismissing Action", approved a settlement of the issues in Nos. 78-1545 and 78-1549. The other, "Order Awarding Seniority", granted retroactive competitive seniority to terminated employees who might be re-employed under the settlement. *ALSSA* v. *TWA*, 630 F. 2d 1164 (7th Cir. 1980)

[2] As required by Rule 28.1 of this Court, Trans World Airlines, Inc. states that it is a subsidiary of Trans World Corporation, of which Hilton International Co., Canteen Corporation, Spartan-Newfoods Corp., and Century 21 Real Estate Corporation are also subsidiaries.

seniority order alone will adequately protect the interests of the currently employed flight attendants whom the union solely represents.

If the settlement order is excluded from review in No. 80-951, the petitions in Nos. 78-1545 and 1549 would be required to be dismissed by the parties pursuant to the settlement agreement (Cert. Pet. Appendix 25a, 35a). It would then be appropriate, *and TWA so moves, that the Court treat the petitions in Nos. 78-1545 and 78-1549 as moot and direct dismissal.*[3]

This motion is prompted by the unexpected grant of all three certiorari petitions after this Court in June 1979 had held up consideration of the petitions in Nos. 78-1545 and 78-1549 pursuant to the parties' motion that they were negotiating a settlement. The parties are put in the position of arguing important time limit and sex discrimination issues under Title VII which, after years of effort, they were able to settle in June 1979. These questions affecting liability and the agreement settling them would be argued orally on the same day under the grant of the three petitions. The reasons for holding up consideration of the petitions in Nos. 78-1545 and 78-1549 continue to exist until this Court issues an order on the union's appeal from the settlement order in No. 89-951. A way out of this incongruous situation would be provided by limitation of review to the seniority order, which will also greatly simplify the review process.

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[3] When litigation is settled after certiorari has been filed, the court of appeals' judgment is vacated and the district court is directed to dismiss the case as moot. *J. Aron & Co.* v. *Mississippi Shipping Co.*, 361 U. S. 115 (1959); *U. S.* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950); *Preiser* v. *Newkirk*, 422 U.S. 403-4 (1975). Such a result would accord with the provisions of the order approving the settlement that the actions are dismissed but that the court retains jurisdiction to enforce the terms of the settlement agreement (Appendix A, this motion).

Difference Between Settlement and Seniority Orders

The crucial difference between the two orders justifies treating them differently.

The settlement agreement differentiated between the overall settlement and competitive seniority. Section III required TWA to pay $1,500,000 to each of Class A and Class B members,[4] to offer re-employment to all terminated employees, and to issue trip passes for non-returning members (Cert. Pet. Appendix 26a). After setting forth the procedure for obtaining court approval of the settlement under Rule 23(e) of the Federal Rules of Civil Procedure, the parties agreed to dismiss the cases involved on the "final order date" after approval. Section V dealt with two kinds of seniority. Subsection A gave each re-employed class member the "amount of company seniority and length of service" for the entire compensation period (*id.* 29a). Subsection B provided for retroactive competitive (also known as union or occupational) seniority (*id.* 21a, 29a). The total amount of competitive seniority, the agreement stated, "will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA." The class representatives agreed to present the matters involved in the court's determination of seniority "within a reasonable time after the entry of an order approving the settlement."

Thus the settlement agreement contemplated two different decisions. One would involve the approval of the overall agreement and would go into effect on a "Final Order Date", which was defined and explained in the agreement (*id.* 25a, 35a, 36a). The decision on competitive seniority could be

[4] The main distinction between them is that Class A members, of whom there are approximately 30, were held by the court of appeals to have complied with the Title VII time limit while Class B members (approx. 400) were held not to have complied. 582 F. 2d 1142.

made at the same time or separately as indicated by the provision that the decision on seniority could be entered after the order approving the settlement.

This distinction was carried out in the two orders appealed by the union. They were entered after separate hearings on the settlement and competitive seniority. The Order Approving Settlement and Dismissing Actions (App. A, this motion) gave the class members the benefits provided by the overall settlement and ordered the actions to be dismissed. The order expressly retained jurisdiction to determine the amount of accrued and retroactive competitive seniority as provided in Section V B of the agreement. The Order Awarding Seniority (App. B, *id.*) gave each terminated flight attendant who might be later employed under the agreement the amount of competitive seniority to which she was entitled when her employment was terminated plus seniority for the period up to the date of the settlement agreement.

The settlement order will become final and ready to be complied with when it is no longer subject to review (Cert. Pet. Appendix 35a-36a). Thus, if the union had not appealed from the settlement order, the parties could have proceeded to carry it out after district court approval in November 1979 and the end of the notice of appeal period. However, since the union's appeal included the settlement order, the parties cannot proceed with the agreement until this Court enters an order affirming or refusing to review the order in No. 80-951. This Court's refusal to review the order would then permit the parties to proceed with the settlement. As explained later (pp. 7-10), the issues raised by the union against the settlement order could continue to be considered in review of the seniority order. The seniority decision of this Court would not affect the other benefits, nor the validity, of the settlement agreement.

Interest of Union Limited to Competitive Seniority

The benefits of the overall settlement do not adversely affect the currently employed flight attendants whom the union solely represents. Their interest is limited to competitive seniority. Despite the union's inclusion of the settlement approval order in its appeal, it has conceded that it had no objection to the overall settlement.

In the trial court the union was very precise in limiting its objection as intervenor to competitive seniority. Its trial court brief explained the distinction "between those portions of the settlement to which the Intervenor does *not* object and those to which the Intervenor's objections *are* directed" (emphasis not added). The brief then stated in two paragraphs[5] what was not

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[5] "The Settlement Agreement provides for payment by TWA, to the class, of three million dollars (Settlement Agreement, Page 4), an offer or reemployment (Settlement Agreement Page 5), trip passes for class members not returning to employment (Settlement Agreement, Page 11), and 'Company seniority and length of service' to which each reemployed class member 'was entitled at the date on which her employment was terminated plus Company seniority and such length of service for the entire compensation period . . .' (Settlement Agreement, Section V. A., Page 8). *As to the preceding entitlements of class members, the Union-Intervenor concededly has no standing to object and, indeed, does not object. Presently-employed flight attendants, represented by the Union, are not adversely affected by these provisions.*

"The Settlement Agreement further provides, however, that reemployed class members shall be 'restored to full occupational (Union) seniority and credit for length of service to the same extent as is provided in Section V. A. above' (Settlement Agreement, Section V. B., Page 8). The Settlement Agreement, in the latter section, provides for timely objection of any interested person (presumably including the Intervenor) as to the 'amount of seniority and credit for length of service for the compensation period.' *It is this 'full occupational (Union) seniority and credit for length of service'*, not only for the compensation period, but also that to which the class members were entitled at the date on which their respective employment was terminated, *to which the Union-Intervenor objects.*" (Emphasis added)

and what was objected to. The union there conceded that its members "are not adversely affected" by the provisions of the settlement for the payment of three million dollars by TWA, the re-employment of the terminated class members, and company seniority. It is only the provision for full competitive seniority, as determined by the district court, to which the union objected.

Similarly in this Court the union's brief in reply to opposing briefs indicates how its members' interests are limited to competitive seniority. Answering the plaintiffs' argument that an incumbent flight attendant could not be forced out of her job or required to transfer pursuant to the settlement, the union's brief contends this was not true "because of" the competitive seniority rights granted to the re-employed flight attendants (Petitioner's Reply to Briefs In Opposition, p. 3). Answering the plaintiffs' contention that the union's argument would prevent a settlement of liabilities in a Title VII case, the union replied:

> "Nonsense. It would mean only that where liability has not been proved and the Union is not a party to the settlement, the company and the plaintiffs *could not agree to grant the plaintiffs competitive seniority.*" (*id.* p. 7, emphasis added)

And the union's "Conclusion" treated competitive seniority as the sole ground of objection (*id.* p. 8). Noting the respondents' contention that certiorari should be denied "so that the settlement will not be frustrated", the union answered,

> "But settlements *which abrogate the legitimate seniority rights of incumbent employees* on behalf of individuals who have failed to prove a violation of Title VII *should be frustrated.*" (Emphasis added)

Union's Contentions Against Settlement Order Apply to Seniority Order

If the legal contentions relevant to the settlement approval order are also relevant to the seniority order, the case in this

Court would be simplified by confining review to the seniority order. At this stage, the parties do not know the "special and important reasons" (Rule 17 of this Court) that were believed to justify discretionary review. But whatever the reasons, they exist for review of the seniority order alone and do not require review of the settlement approval order.

The union's attack on the settlement order, as raised by Question 1 (p. i) and argued in Point I in the No. 80-951 petition (pp. 9-18), is jurisdictional. The union contends that the district court had no jurisdiction to approve the settlement as to the 400 (approx.) class members who, the court of appeals held in the decision before this Court in No. 78-1545, had not complied with a Title VII time limit that is a prerequisite of jurisdiction over their claims. The union's authorities for the argument are the statement in *United Airlines* v. *Evans*, 431 U. S. 553, 558 (1977), a Title VII case, that a "discriminatory act which is not made the basis for a timely charge . . . has no legal consequences"; the holding in *McArthur* v. *Southern Airways*, 569 F. 2d 276 (5th Cir. 1978), vacating a consent decree in a Title VII case for lack of jurisdiction when all plaintiffs conceded non-compliance with the time limit; and the long line of cases holding the Title VII time limit to be jurisdictional (Cert. Pet. 10-17). There are strong reasons why these decisions, which fully support the court of appeals' jurisdictional holding, do not invalidate the settlement here. For example, the settlement, when approved, will result in vacating the court of appeals' decision (see above, p. 3, footnote), which was not final when the settlement was made (and is still not final).

But more significantly for the present motion, it is evident from the union's brief that its jurisdictional argument, if legally sound, would be available to reverse the seniority order even though the settlement order was sustained by the Court's refusal to review it. The settlement agreement provided that competitive seniority would be decided by the district court

pursuant to § 706(g) of Title VII "and all other applicable provisions of law." Competitive seniority could thus have been allowed or disallowed by the district court as the law required. The current employees' interest was thus adequately protected by the right to attack the seniority order as to the 400 (approx.) class members held to have failed to comply with the jurisdictional time limit.

The union relies heavily on the holdings of *Franks* v. *Bowman Transportation Company*, 424 U. S. 747 (1976), that competitive seniority is an appropriate remedy (a) after a discriminatory act has been proved and (b) absent an unusual adverse impact on current employees. *Evans* indicates that a holding of violation of Title VII is impossible when jurisdiction over the claim is lacking. Consequently, the union's argument on the court of appeals' holding of lack of jurisdiction would, if sustained, defeat the seniority order. Point II of the union's petition, attacking the seniority allowance for lack of a finding of a violation of Title VII, means that a violation was not established because there was no jurisdiction. The seniority order, without review of the settlement order, thus involves the question of whether the time limit was not complied with and was a jurisdictional requirement as held by the court of appeals. On this question, the seniority order might be reversed as to class members who had failed to comply with the Title VII time limit. This result might be held consistent with the union's contention that *Franks* and *Evans* require denial of competitive seniority to an employee who fails to establish a right to recover under Title VII. The settlement between the plaintiffs and TWA as to matters other than competitive seniority would not be affected. The parties to the litigation would be permitted to make a valid settlement regardless of the possible lack of jurisdiction over the claims settled.

Similarly the union's contention that the seniority allowance violates the collective bargaining agreement between the union and TWA (Cert. Pet. 9, 17, 20) can be reviewed by

consideration of only the seniority order. The benefits conferred by the settlement order do not violate the collective bargaining agreement.

This is even true of the issue of unlawful sex discrimination (not argued by the union) if the grant of certiorari in No. 78-1549 indicates the Court's interest in considering whether TWA's pre-1970 practice was unlawful sex discrimination under Title VII. The overall settlement order could be permitted to stand unreviewed and, in reviewing the seniority order, the court could consider whether there had been a violation of Title VII by TWA if, as the union argues, establishment of a violation is necessary to an allowance of competitive seniority under the *Franks* and *Evans* cases.

Unfair Effect on Parties if Review Not Limited to Seniority Order

The inclusion of the settlement approval order in certiorari review has the unfair effect on TWA, as well as the class members, of prolonging the efforts to dispose of this litigation by a reasonable compromise. In October 1970, shortly after the suit was begun, TWA abandoned the pregnancy practice complained of in the complaint. The claims of flight attendants previously terminated were compromised in a 1971 settlement which, approved by the district court, was set aside on appeal with certiorari denied (416 U. S. 993 (1974)). After an adverse summary judgment of unlawful sex discrimination in 1976, the court of appeals in 1978 affirmed the holding but held a large number of class members had failed to comply with a Title VII time limit for filing claims. While discussing settlement, the parties kept the disputed issues alive by certiorari petitions in this court in Nos. 78-1545 and 1549. In June 1979 the disputed issues were settled in the agreement approved by the district court in November 1979 and the court of appeals in June 1980.

The union's appeal from both the settlement and seniority orders in No. 80-951 has prevented the parties from proceeding with the settlement. It is ironical that the union's objection is to the grant of retroactive competitive seniority. The 1971

settlement was disapproved by the court of appeals on the converse of this issue: the 1971 settlement *did not* grant retroactive competitive seniority. *ALSSA* v. *American Airlines, Inc.*, 490 F. 2d 636 (7th Cir. 1973), cert. den. 416 U. S. 993 (1974). TWA has thus been unable since 1979 to end the litigation because of the inclusion of what, excluded in 1971, defeated the 1971 settlement. In both cases, the dispute over seniority does not involve TWA but the competition between current and re-employed flight attendants.

TWA should be permitted to get out of this litigation by the compromise which both lower courts have held to be reasonable and fair to the parties. This result can be readily achieved if this Court limits its review to the seniority order.

CONCLUSION

Limitation of review to the seniority order as requested in this motion will simplify the varied issues raised by the granted petitions and permit a more expeditious disposition of this protracted litigation. Such a limitation, which is very much in the interest of TWA and the class members, would not deprive current employees represented by the union of their right to protect their interest, which is only in the allowance of competitive seniority.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, *et al.*,

Plaintiffs,

vs.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, *et al.*,

Plaintiffs,

vs.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,

Defendants.

ORDER APPROVING SETTLEMENT AND DISMISSING ACTIONS

The court has considered the proposed Settlement Agreement, as amended, for the compromise of these actions and has considered the written and oral presentations of the parties under Rule 23(e), F.R.C.P. The court finds that proper notice of the proposed settlement and the hearings thereon was given to the members of plaintiff class and Subclasses A and B; and

that no class member objected to the settlement. The court also finds that the settlement agreement is fair, reasonable, and adequate for the parties and Subclasses A and B.

Accordingly, it is ordered, that the Settlement Agreement, as amended, is approved and the actions are dismissed. The court finds, pursuant to Rule 54(b), F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

The court retains jurisdiction:

(a) to determine the total amount of seniority and credit for length of service (both accrued and retroactive) for re-employed class members as provided in Section V B of the Settlement Agreement as amended,

(b) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,

(c) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of eligibility of class members, and

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

Dated November 8, 1979

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, *et al.*,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, *et al.*,

Plaintiffs,

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, and TRANS WORLD AIRLINES, INC.,

Defendants.

ORDER AWARDING SENIORITY

The court having considered the evidence, testimony and briefs which have been submitted in connection with the issue of seniority, pursuant to Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) and Section V of the Settlement Agreement, as amended, and the court finding that full restoration of retroactive seniority will not have an unusual adverse impact upon currently employed flight attendants in a

manner which is not typical of other Title VII cases, it is ordered that each class member who is now employed as a TWA flight attendant or who will hereafter become employed as a flight attendant by TWA under the Settlement Agreement shall be credited with the amount of union ((occupational) seniority to which she was entitled on the date on which her employment was terminated, plus credit for such seniority for the "compensation period", as defined in the Settlement Agreement (at page 3), less the deductions provided therein (at p. 8), the terms of which are incorporated by reference and are adopted as part of this Order.

The court having approved the Settlement Agreement in a separate order, it is ordered that this case be, and is hereby, dismissed. The court finds, pursuant to Rule 54(b), F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

However, this court hereby retains jurisdiction:

(a) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,

(b) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of any eligibility of class members, and

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

Dated Nov. 8, 1979

Office-Supreme Court, U.S.
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APR 21 1981
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IN THE

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OCTOBER TERM, 1980

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Respondent,

TRANS WORLD AIRLINES, INC.,

Cross-Petitioner,

vs. No. 78-1549

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Cross-Respondents,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

vs. No. 80-951

TRANS WORLD AIRLINES, INC. and ANNE B. ZIPES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE OF THE PLAINTIFF CLASS TO TRANS WORLD AIRLINES MOTION TO LIMIT REVIEW (ETC.) AND MOTIONS IN THE ALTERNATIVE THERETO

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RESPONSE OF THE PLAINTIFF CLASS TO TRANS WORLD AIRLINES MOTION TO LIMIT REVIEW (ETC.) AND MOTIONS IN THE ALTERNATIVE THERETO

Anne B. Zipes, et al., individually and as representatives of the Plaintiff Class[1], have no objection to the motion of TWA to limit review (entitled Motion By Trans World Airlines, Inc., To Limit Review In No. 80-951 To Issue Of Seniority And Treat Nos. 78-1545 And 78-1549 As Moot). However, the Plaintiff Class believes that this response is necessary in order to clarify the issues and to present motions in the alternative, in the event that TWA's motion is denied.

Granting either TWA's motion or the alternative relief requested herein will not restrict the legal issues which are involved in No. 80-951. It will, however, reduce the number of parties and facilitate implementation of the settlement agreement between TWA and the plaintiff class. If, however, TWA's motion is denied, this Court should enter one of the orders proposed herein, the essential reason for which is the absence of any case or controversy between TWA and the Plaintiff Class under the U.S. CONST., art. 3, § 2, clause 1.

Both TWA and the Plaintiff Class desire to implement the settlement agreement of June 1979. No aspect of that settlement will affect any of the rights of the Petitioner in Dock. No. 80-951 (the Union).

The Settlement Agreement was entered into shortly after the plaintiffs and TWA filed cross petitions for certiorari to review the 1978 decision of the Seventh Circuit, *In re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F.2d 1142, which (1) affirmed a summary judgment on the merits in favor of the plaintiffs and (2) held that the claims of the members of Subclass B were jurisdictionally defective. The Settlement Agreement of June 1979 put those issues to rest.

The Settlement Agreement provided for the payment of $3,000,000 to the class, the right to reemployment and restoration of *company* seniority (which affects pay, vacations, etc.), all

[1] These class representatives are the petitioners in Dock. No. 78-1545, and respondents in Nos. 78-1549 and 80-951.

of which are of not interest to the Union.[2] The Union's only interests regard *competitive* seniority (which affects bidding rights on routes, preferences in the event of layoffs, etc.).

The Settlement Agreement provided that its terms would be implemented as soon as the settlement approval order became final. Finality was defined as the occurrence of events which rendered the settlement as being "no longer subject to review or modification".

The Settlement Agreement did not purport to grant competitive seniority to reemployed class members. The Settlement Agreement merely recognized that competitive seniority was a matter which could only be decided by the District Court, in an adversarial proceeding in which the Union would participate. The District Court approved the settlement under Rule 23(e), F.R.C.P. In a separate Order, the District Court granted competitive seniority.

One of the Union's points was that the grant of competitive seniority was improper because of the alleged lack of jurisdiction. The Union filed notices of appeal from both orders.[3] However, it is abundantly clear that the Union's jurisdictional challenge to the order which approved the Settlement Agreement goes not to the settlement, *qua settlement,* but only as the underpinning to the order which granted competitive seniority.

Thus, the Settlement Agreement has already become final and enforceable and both TWA and the plaintiff class are now bound to comply with the provision therein, which states:

> "The parties shall jointly file in the United States Supreme Court a motion and stipulation that the ... writs of

---

[2] The Union repeatedly has expressly disavowed any interest in the provisions of the Settlement Agreement, by its statements in the District Court, its briefs in the Seventh Circuit and in this Court. Indeed, the Union has no standing to quarrel with any of the provisions of the Settlement Agreement.

[3] No other class member, person or party objected to or appealed from approval of the settlement.

certiorari . . . be dismissed immediately after [the settlement approval becomes final]."

It is clear that, as between TWA and the plaintiff class, nothing can possibly happen in this Court which might modify or invalidate the settlement. Even if this Court were to decide that the District Court was lacking jurisdiction over the claims of Subclass B, it would not affect the validity and binding effect of the settlement, for the simple reason that the pivotal issue of whether the timely filing of an EEOC charge affects jurisdiction has been settled and compromised.

In short, the controversies in Dock. Nos. 78-1545 and 78-1549 have *already* become moot and TWA has a contractual obligation to join with the class in stipulating to dismiss those two writs of certiorari. If TWA refuses to so stipulate, it should be ordered to do so.

Notwithstanding this obvious posture of the mutual rights and obligations of TWA and the class, the granting of TWA's motion will cause no harm to any of the parties in the three consolidated cases. Importantly, the granting of the motion and/or dismissal of those two writs will still leave before this Court all of the issues regarding whether compliance with the EEOC time-filing requirements is "jurisdictional".

But if, on the other hand, TWA's motion is denied, it will prolong litigation between TWA and the class in a case which has been settled—unless the class obtains an order from the District Court compelling specific performance of TWA's promise to join in dismissing these two writs. Whether that relief would be forthcoming in the District Court is uncertain. In the meantime, the class members are being denied the benefit of their bargain. For almost two years, they have been denied the use of the money and their rights to return to work.

Moreover, if this Court holds that the District Court lacks jurisdiction, TWA will undoubtedly disavow the Settlement

Agreement as being unenforceable. Indeed, in that event TWA may not need affirmatively to make this argument because the class may then perforce be deprived of the necessary forum in which to enforce the Settlement Agreement, no matter what position TWA then adopts.

Accordingly, the plaintiff class suggests to this Court, in the alternative, that:

1. TWA's motion be granted, or

2. TWA and the plaintiff class be ordered to stipulate to dismiss the writs in Dock. Nos. 78-1545 and 78-1549, or

3. This Court itself dismiss the aforesaid writs as being moot.

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IN THE

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Respondent,

TRANS WORLD AIRLINES, INC.,

Cross-Petitioner,

vs. No. 78-1549

ANNE B. ZIPES, et al.,

Cross-Respondents,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

vs. No. 80-951

TRANS WORLD AIRLINES, INC. and ANNE B. ZIPES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL RESPONSE OF THE PLAINTIFF CLASS REGARDING THE PENDING MOTION OF TWA AND THE PLAINTIFF CLASS

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PETITION FOR CERTIORARI IN NO. 78-1545 FILED APRIL 10, 1979, IN NO. 78-1549 ON APRIL 11, 1979, AND IN NO. 80-951 ON DECEMBER 12, 1980. ALL PETITIONS WERE GRANTED MARCH 9, 1981

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL RESPONSE OF THE PLAINTIFF CLASS REGARDING THE PENDING MOTION OF TWA AND THE PLAINTIFF CLASS

TWA's motion seeks to limit review in No. 80-951 to the issues regarding the district court's grant of retroactive competitive seniority. TWA's position (with which the plaintiff class disagrees) is that only if TWA's motion is granted will the

district court's separately entered settlement approval order become final and thereby enable TWA and the plaintiff class to implement forthwith the settlement agreement, including dismissal by stipulation of the writs of certiorari in Nos. 78-1545 and 78-1549.

In its opposition to TWA's Motion to Limit Review, the Union recites three provisions in the settlement agreement on which it challenges the settlement approval order:

> (a) The provision stating that the settlement agreement supersedes contrary provisions in flight attendant labor agreements;
>
> (b) The provision stating that the district court has continuing jurisdiction to enforce the settlement agreement; and
>
> (c) The provision stating that the settling parties' contemplated that the district court would conduct a separate hearing into the seniority question.

(Response of Independent Federation of Flight Attendants to Motion of TWA) These three provisions are, however, meaningless to the plaintiff class, to TWA and to the Union. Each provision recites a matter that by operation of law would exist even in the absence of the provision.

Provision (a) merely states what is true as a matter of law. The benefits obtained by the class members become TWA's irrevocable obligation. Being thus bound, TWA could not thereafter reduce its obligations to the class members simply because of contrary provisions in a labor agreement. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 779 (1976). Provision (b) also recites the obvious. The District Court would retain jurisdiction over the settlement agreement even in the absence of any such statement by the settling parties. Provision (c) neither imposes obligations upon nor obtains rights for any of the parties. Title VII either did or did not confer upon the district court the power to grant competitive seniority. This is a question of law rather than a matter that could be determined by the settling parties.

Thus, the three provisions of the settlement agreement have no impact upon the Union. It follows that the order approving the settlement agreement would have had the same effect upon the Union even in the absence of those three provisions. Excluding the settlement approval order from review in No. 80-951 will leave the Union in exactly the same position it now occupies. It will not restrict the Union's arguments on any issue nor will it restrict the Union's obtaining any of the relief to which it would otherwise be entitled in this Court.

Accordingly, TWA's motion should be granted. In the alternative, if TWA's motion is denied, one of the alternative motions of the plaintiff class should be granted.

Respectfully submitted,

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Nos. 78-1545, 78-1549, 80-951 (Consolidated)

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IN THE

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TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

v.

ANNE B. ZIPES, *et al.*,
Respondents,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
and ANNE B. ZIPES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONSE OF INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS TO MOTION OF TRANS WORLD AIRLINES TO LIMIT REVIEW AND ALTERNATIVE MOTIONS BY THE PLAINTIFF CLASS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 78-1545

ANNE B. ZIPES, *et al.*,
Petitioners,

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TRANS WORLD AIRLINES, INC.,
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ANNE B. ZIPES, *et al.*,
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and ANNE B. ZIPES, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONSE OF INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS TO MOTION OF TRANS WORLD AIRLINES TO LIMIT REVIEW AND ALTERNATIVE MOTIONS BY THE PLAINTIFF CLASS

The Independent Federation of Flight Attendants, Petitioner in Case No. 80-951 (hereinafter "the Union") has read the motion of TWA, and the alternative motions of Plaintiffs with much interest. We make the following brief response.

1. The Union takes no position on what Plaintiffs and TWA should do with their petitions (78-1545 & 78-1549). This would include any question whether review of those petitions should be limited, stayed, or the petitions dismissed, with or without prejudice.

2. The Union objects, however, to any limitation on any of the issues raised in its petition (80-951).

3. The characterization which Plaintiffs and TWA place on the issues raised by the Union is not entirely accurate. It is true that our only reason for pursuing this appeal is the grant of retroactive competitive seniority to the members of the Plaintiff class. It is not, however, accurate to state that the Union has no objections to the order approving the settlement agreement. The Union objects, *inter alia*, to the following provisions contained in the settlement agreement:

> (a) A provision which states that the settlement agreement supersedes "prior, current and future labor agreements." (See the Appendix to our Petition for Certiorari [80-951] at pp. 36a-37a).
>
> (b) Provisions stating that the District Court will retain jurisdiction to enforce the terms of the settlement and adjudicate any disputes which arise thereunder (Appendix to Petition 80-951 at 17a and 37a).
>
> (c) A provision which allows the District Court to determine and grant retroactive competitive seniority to the Plaintiff class (Appendix to Petition 80-951 at 20a, 29a-30a). It is this provision which the parties used to confer jurisdiction upon the Dis-

trict Court to grant seniority despite the unchanged finding of the Court of Appeals that jurisdiction is lacking.

4. The Union has always been on record as believing that there *can* be a settlement of these claims, even though they are jurisdictionally defective. We have questioned whether the settlement can be court approved (see Petition 80-951 at p. 14) and whether *this* settlement is valid. Our position has not changed. We take no position on the Plaintiffs' contention that TWA is contractually bound by the settlement whether or not the court approval is affirmed. We believe, however, that certainly TWA *could* be bound by *a* settlement if it would so agree.

5. While our position has remained consistent the position of Plaintiffs and TWA has not. Plaintiffs have contended throughout this litigation that acceptance of any of the Union's contentions would defeat the entire settlement (see, for example, Plaintiffs' Brief in Opposition to Petition 80-951, p. 12, n. 13). Now the Plaintiffs contend that there already is a final settlement, regardless of the outcome of the matters raised by the Union. TWA and the Plaintiffs were able to convince both the District Court and the Seventh Circuit to reject the Union's arguments on the theory that the parties should not be forced against their will to litigate before the Supreme Court. (See the Appendix to Petition 80-951 at 9a, 15a). Today both Plaintiffs and TWA take the position that their petitions can be dismissed without any effect upon the issues raised by the Union. We marvel at the inconsistency, and wonder why the parties did not take this position two years earlier.

CONCLUSION

We apologize to the Court for the confusion, but submit that it is not the Union which has caused it. Should the Court have any questions regarding the Union's position, we stand ready to respond to the Court's inquiry.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE OF TRANS WORLD AIRLINES, INC. TO ALTERNATIVE MOTIONS OF PLAINTIFF CLASS CONCERNING DISMISSAL OF NOS. 78-1545 AND 78-1549

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PETITION FOR CERTIORARI IN NO. 78-1545 FILED APRIL 10, 1979, IN NO. 78-1549 ON APRIL 11, 1979, AND IN NO. 80-951 ON DECEMBER 12, 1980. ALL

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RESPONSE OF TRANS WORLD AIRLINES, INC. TO ALTERNATIVE MOTIONS OF PLAINTIFF CLASS CONCERNING DISMISSAL OF NOS. 78-1545 AND 78-1549

Trans World Airlines, Inc.[1] welcomes plaintiffs' support for its motion but objects to their alternative motions. Our

[1] As required by Rule 28.1 of this Court, Trans World Airlines, Inc. states that it is a subsidiary of Trans World Corporation, of which Hilton International Co., Canteen Corporation, Spartan-Newfoods Corp., and Century 21 Real Estate Corporation are also subsidiaries.

objectives are the same: performance of the settlement agreement before the Court in No. 80-951 and dismissal of Nos. 78-1545 and 1549 as moot, both held up by the union petitioner's inclusion of the settlement approval order in No. 80-951 despite its conceded lack of interest in anything but competitive seniority. But the results of the motions would be substantially different. TWA's motion, excluding the settlement approval order from review, would obtain final court approval of the settlement. Plaintiffs' motions would leave the settlement order undisposed of and the settlement without court approval. This result is undesirable and wrong on several grounds.

Plaintiffs argue that the settlement agreement is now ready to be performed because the union petitioner in No. 80-951, with an interest only in the seniority order, cannot validly object to the settlement approval order. However, regardless of the union's real interest or standing, it did in fact appeal from the settlement approval order as well as the seniority order. And this Court has in fact granted certiorari to review the court of appeals' decision, expressly affirming both orders (cert. pet. No. 80-951, App. p. 10a). Plaintiffs are asking the Court to bypass the clear requirement of Rule 23(e) of the Federal Rules of Civil Procedure: "A class action shall not be dismissed or compromised without the approval of the court, . . ." Approval of the settlement by the district court's order, affirmed by the court of appeals, does not meet the Rule 23(e) requirement while this Court has granted the union's certiorari petition seeking reversal of the settlement approval order.

Plaintiffs' contentions also disregard the clear meaning of provisions of the settlement agreement itself although they rely on the agreement as the basis of their contentions. The settlement agreement requires TWA to make money payments and reemploy class members within certain periods "following the Final Order Date" (*id.* 27a, 30a). The "Final Order Date" is defined to mean the date on which a settlement approval order "becomes final and no longer subject to court review"

(*id.* 25a). If an appeal is taken from the order, the Final Order Date occurs when the order is affirmed and is "no longer subject to review or modification." If the district court disapproves the settlement in an order not thereafter reversed, the "Agreement shall be null and void and shall have no force or effect" (*id.* 35a-36a). The agreement was entered into after the certiorari petitions had been filed in Nos. 78-1545 and 78-1549. Accordingly the settlement agreement provided that the parties would file a motion and stipulation in the Supreme Court that the "currently pending petitions for writs of certiorari be held in abeyance during the settlement procedures, to be dismissed immediately after the Final Order Date" (*id.* 35a). Plaintiffs' inaccurate quotation of this provision (pp. 3-4) wrongly implies that the time for dismissal of the two petitions has now arrived. That will not happen until this Court refuses to review or affirms the settlement approval order. The plaintiffs' motion thus asks the Court to enter orders contrary to express provisions of the settlement agreement.

Plaintiffs' contentions are based on an assumption that the settlement agreement would be effective and binding on TWA if this Court were to reverse the settlement approval order in No. 80-951 after having treated Nos. 78-1545 and 78-1549 as moot. The assumption is refuted not only by the requirement of court approval in Rule 23(e), but also by the quoted provision of the agreement that would make the unapproved agreement "null and void" (*id.* 35a-36a).

Plaintiffs would have the Court order the parties to stipulate to "dismiss the writs" in Nos. 78-1545 and 78-1549 or alternatively to "dismiss the writs" itself. The settled Court practice, noted in TWA's motion (p. 3 n3), is otherwise:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."

United States v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950). A footnote lists over 30 supporting Supreme Court citations. Later cases to the same effect include *Preiser* v. *Newkirk*, 422 U. S. 395, 403-4 (1975), and *County of Los Angeles* v. *Davis*, 440 U. S. 625, 634 (1979). TWA's motion accords with this Court's practice.

CONCLUSION

Plaintiffs' alternative motions, in contrast to TWA's motion, are contrary to their settlement agreement with TWA, Rule 23(e) of the Federal Rules of Civil Procedure, and this Court's settled practice. The present complexities of this litigation would be solved simply and certainly by the granting of TWA's motion.

Respectfully submitted,

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No. 78-1545 and 80-951 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 78-1545

ANNE B. ZIPES, *et al.*, *Petitioners*,

v.

TRANS WORLD AIRLINES, INC., *Respondent*,

No. 80-951

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, *Petitioner*,

v.

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, *et al.*, *Respondents*.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PLAINTIFF CLASS

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QUESTIONS PRESENTED

Former Section 706(d) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-5(d) (1970)) provided that an aggrieved person must file a charge with the Equal Employment Opportunity Commission within 90 days of the alleged unlawful employment practice. Upon receipt of a "right-to-sue" letter from the EEOC, the aggrieved person may file a civil action in federal court against the respondent named in the charge.

The question presented in No. 78-1545 is:

Whether the 90-day requirement of former Section 706(d) is subject to waiver or estoppel in a civil action in federal court.

To the extent that the two questions presented in No. 80-951 differ from the question presented in No. 78-1545 in light of the union's arguments, both questions may be stated as follows:

Whether the district court properly approved the settlement agreement and ordered retroactive seniority regardless of how this Court ultimately interprets former Section 706(d).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 78-1545 and 80-951 (Consolidated)

No. 78-1545

ANNE B. ZIPES, *et al.*, *Petitioners,*

v.

TRANS WORLD AIRLINES, INC., *Respondent,*

No. 80-951

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, *Petitioner,*

v.

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, *et al.*, *Respondents.*

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PLAINTIFF CLASS

OPINIONS BELOW

The opinion of the court of appeals in No. 78-1545 (*In re Consolidated Pretrial Proceedings in the Airline Cases*) is reported at 582 F.2d 1142 (1978), and is reprinted in Pet. App. No. 78-1545, at pp. A1-A17. The relevant opinions of the district court are reprinted in Pet. App. No. 78-1545, at pp. A21-A25; and I J.A. 126a-129a, 130a-134a.

The opinion of the court of appeals in No. 80-951 (*Air Line Stewards and Stewardesses Ass'n, Local 550* v. *Trans World Airlines, Inc.*) is reported at 630 F.2d 1164 (1980), and is reprinted in Pet. App. No. 80-951, at pp. 1a-10a. The orders of the district court rejecting the union's arguments

regarding jurisdiction, approving the settlement and awarding seniority are reprinted in Pet. App. No. 80-951, at pp. 13a-19a.

The court of appeals rendered three other decisions in the course of this litigation: *Air Line Stewards and Stewardesses Ast'n, Local 550* v. *American Airlines, Inc.*, 455 F.2d 101 (1972); *Air Line Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (1973), *cert. denied*, 416 U.S. 993 (1974); *Air Line Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (1978), *cert. denied*, 439 U.S. 876 (1978) (companion case).

JURISDICTION

The judgment of the court of appeals in No. 78-1545 was entered on August 24, 1978 (Pet. App. No. 78-1545, at A18). The court of appeals denied a timely petition for rehearing on January 11, 1979 (*id.* at A19-A20). The petition for a writ of certiorari was filed on April 10, 1979, and granted on March 9, 1981. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

The judgment of the court of appeals in No. 80-951 was apparently entered on June 13, 1980.[1] The court of appeals denied a timely petition for rehearing on September 17, 1980 (Pet. App. No. 80-951, at 11a-12a). The petition for a writ of certiorari was filed on December 12, 1980, and granted on March 9, 1981. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

On May 18, 1981, the Court entered an order limiting the writ of certiorari in No. 80-951 to questions 1 and 2 in the certiorari petition and dismissing the writ as improvidently granted with respect to question 3 (see Pet. No. 80-951, at p. ii; II J.A. 212).

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[1] Petitioner union did not include in its petition for a writ of certiorari a copy of the judgment; June 13, 1980, is the date of the opinion.

STATEMENT

This litigation reaches the Court after eleven years of proceedings and four opinions of the court of appeals.[2] During this period, three different unions have acted as the collective bargaining agent for TWA flight attendants.[3] In 1970 the first union brought the lawsuit that nine years later resulted in the settlement now opposed by the latest union. Much of this union's Brief is based on factual assertions that in the long history of this case TWA has never been found to have engaged in unlawful employment practices when it discharged flight attendants who became mothers between 1965 and 1970;[4] that the settlement agreement conferred jurisdiction on the district court;[5] that in the settlement agreement TWA granted retroactive competitive seniority to plaintiff class members;[6] and that according to the record, "hundreds" of class members whose claims were jurisdictionally barred will be returning to the bargaining unit as flight attendants.[7]

Since these factual assertions and others made by the union are not accurate, we offer this statement so that the history of this litigation may be correctly understood.

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[2] Or five, if one includes the 1978 opinion affirming the district court's approval of the settlement in the consolidated American Airlines case (see note 18 *infra*).

[3] See note 16 *infra*.

[4] Compare Union Brief, at pp. 29, 30, 37, 49, with pp. 8-9, 20, 37 *infra*.

[5] Compare Union Brief, at pp. 37, 41, with pp. 9, 20-21, 36-37 *infra*.

[6] Compare Union Brief, at pp. 18, 21-23, with pp. 13-14, 18-19 *infra*.

[7] Compare Union Brief, at p. 11, 50, with p. 13 *infra*.

A. The Original Complaints And The Airlines' Answers

1. TWA's "no-mothers" policy.

Prior to 1970, TWA followed a practice of removing flight attendants from flight duty while they were pregnant and permanently discharging them if they became mothers (by giving birth or adopting a child) unless they accepted a non-flight position.[8] Pet. App. No. 78-1545, at A2. On the other hand, male flight attendants (or "pursers" under TWA's prior designation)[9] could remain on flight duty after becoming a parent although their responsibilities were substantially the same as those of female flight attendants. *Id.* at A2-A3.[10]

2. The complaints against TWA and American Airlines

On August 18, 1970, in the United States District Court for the Northern District of Illinois, the collective bargaining representative of TWA and American Airlines flight attendants filed suits against both airlines under Title VII of the

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[8] TWA's service manual provided (I Supp. App. 18, in *In re Consolidated Proceedings, supra*):

> If a hostess becomes pregnant or adopts a child, she will be required to immediately resign from the Hostess Department. . . . Hostesses desiring to continue employment with the Company may request transfer to a ground position or may request a maternity leave.

American Airlines followed a similar practice. See *Airline Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960, 962 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978).

[9] See II J.A. 84.

[10] TWA, on August 5, 1975, stated as follows in answer to Plaintiffs' Fifth Set of Interrogatories:

> b. The Company refused to promote her to the purser classification because of her sex, and to hire females into that classification. Pursers receive higher compensation than hostesses doing substantially the same work and are segregated into separate seniority lists because of their sex.

Civil Rights Act of 1964 (I J.A. 4a).[11] The union (Air Lines Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO) brought the action against TWA on its own behalf and on behalf of five individuals representing a class of female flight cabin attendants then employed by TWA or employed by TWA at any time since July 2, 1965, and who had been or would desire to become pregnant (I J.A. 4a-6a).

The complaint alleged that since July 2, 1965, the effective date of the Act, TWA had engaged in unlawful employment practices by discharging female flight attendants who became pregnant and that TWA had refused in the course of collective bargaining to change its policy and practice (I J.A. 6a). The complaint asserted that the district court had jurisdiction under the Civil Rights Act of 1964, alleged that on June 1, 1970, the union had filed a charge with the Equal Employment Opportunity Commission and on July 31, 1970, had been notified by the EEOC of its right to sue; and sought a declaratory judgment, an injunction, back-pay and whatever additional relief was necessary in order to eliminate the effects of TWA's unlawful practices (I J.A. 4a, 7a-8a).

3. The answers to the complaints.

On September 30, 1970, TWA answered by admitting that the court had jurisdiction under Title VII of the Act but denying that TWA had engaged in unlawful employment practices (I J.A. 8a-12a). TWA alleged two affirmative defenses: that its "no-mothers" policy was a bona fide occupational qualification (42 U.S.C. §2000e-2(e) (1970)); and that the policy constituted a system measuring earnings by quantity and quality of production (42 U.S.C. §2000e-2(h) (1970)) (I J.A. 12a). TWA's answer did not raise lack of timeliness as a defense.

The answer of American Airlines, filed on the same day as TWA's, also admitted jurisdiction, denied that American

[11] The complaint against American Airlines is reprinted in I Supp. App. 1-6, in *In re Consolidated Pretrial Proceedings, supra.*

had violated the Act, offered the same affirmative defenses and raised no defense of lack of timely filing (I Supp. App. 12-16, in *In re Consolidated Pretrial Proceedings, supra*).

B. The Proposed 1971 Settlements Of The Cases

In October 1970, the union (ALSSA) and the defendant airlines renegotiated their collective bargaining agreements to allow currently-employed female flight attendants to remain in their jobs after becoming mothers and to permit those who left the company because of pregnancy on or after August 1, 1969, to return to active service as flight attendants (I J.A. 13a). The union and the airlines then entered into negotiations in an attempt to settle the cases.

On July 16, 1971, the parties filed proposed settlement agreements providing that any former hostess who was removed from the payroll between July 2, 1965, and July 31, 1969, because of pregnancy would be placed on a preferential hiring list if she gave timely written notice of her desire to return (I J.A. 25a).[12] The proposed agreements did not provide for back-pay or for an award of the seniority that would have accrued but for the airlines' "no-mothers" policy. At the request of the airlines and the union, the district court on the same day certified the class in the two cases as consisting of all former flight attendants who were removed from the payroll because of pregnancy between July 2, 1965, and July 31, 1969 (I J.A. 19a).

On August 5, 1971, prior to a scheduled hearing on the proposed settlements, the EEOC sought to intervene as of right in both suits. Upon the district court's denial of its motions, the EEOC appealed and the court of appeals issued a stay of all district court proceedings pending resolution of the appeals, which were consolidated. On January 18, 1972, the court of appeals affirmed, holding that the EEOC had no right to intervene despite its arguments that the class in both

[12] These proposed settlement agreements are reprinted in I Supp. App. 33-37 in *In re Consolidated Pretrial Proceedings, supra.*

cases was not adequately represented and that the proposed settlements were inadequate. *Air Lines Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 455 F.2d 101 (7th Cir. 1972).

In orders dated March 17, 1972, the district court approved the settlements for the members of the classes defined in its previous orders (I J.A. 54a-56a). The objections of some of the class members to the settlements resulted in the second opinion of the court of appeals in this litigation. *Air Lines Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974) (I J.A. 64a-78a). The court of appeals recognized that "All the stewardesses share the common question of whether the discharge-for-pregnancy policy was lawful." 490 F.2d at 643; I J.A. 76a. ALSSA, however, was found to be an inadequate representative of the class because of the inherent conflict of interest between the currently-employed flight attendants represented by the union and the discharged flight attendants on the issues of reinstatement and retroactive seniority. 490 F.2d at 640; I J.A. 70a-72a. The court of appeals therefore ruled that members of the class should be entitled to intervene in each case to replace ALSSA as the class representative and that the cases should proceed as class actions under Rule 23(b)(3), Fed. R. Civ. Pro. 490 F.2d at 643; I J.A. 77a.

C. Replacement Of The Union Class Representative

On remand, the district court appointed the three named petitioners in No. 78-1545 to replace the union in the TWA case as class representatives; redefined the class as all female flight attendants discharged by TWA on or after July 2, 1965, for reason of pregnancy; and formally consolidated the TWA and American Airlines cases (I J.A. 90a-92a, 96a-97a).

D. TWA's Attempt To Raise A "Statute Of Limitations" Defense

On September 16, 1974, TWA moved for leave to amend its 1970 answer by adding a "Third Affirmative Defense" that because plaintiffs and other members of the class failed to file charges with the EEOC within 180 days of the alleged unlawful practices "their claims are barred by the statute of limitations under section 706(e) of Title VII" (I J.A. 89a).[13] In an opinion and order dated November 20, 1974, the district court granted TWA's motion for leave to amend although in the court's view TWA's unexplained delay in pleading the statute of limitations defense "may well ultimately constitute a waiver of the defense" (I J.A. 101a). In so ruling, the court placed the burden on TWA of proving, through discovery or otherwise, that its delay in asserting the defense was excusable. *Ibid.*

Although the union in its Brief (at p. 14) emphasizes that TWA had been granted leave to amend, the union fails to point out that TWA characterized its "affirmative defense" as statute of limitations and that TWA has never filed an amended answer despite having received leave to do so in 1974.

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[13] Although TWA cited the 180-day limitations period in Section 706(e), the provision in effect when the flight attendants were discharged (1965-1970) was the 90-day period in former Section 706(d) (42 U.S.C. §2000e-5(d) (1970)), which was amended to provide the 180-day period and renumbered in 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §2000e-5(e)).

E. The District Court's Rulings That TWA Had Engaged In Unlawful Sex Discrimination Against *All* Class Members And That The Court Had Jurisdiction

1. The District Court's finding of illegal sex discrimination.

Contrary to statements in the Briefs of the union[14] and *amicus* AFL-CIO,[15] the district court specifically found that TWA and American Airlines, by discharging flight attendants pursuant to a "no-mothers" policy, had engaged in unlawful employment practices in violation of 42 U.S.C. §2000e-2(a) and that each member of the class, including those discharged before 1970, had been a victim of illegal sex discrimination (I J.A. 133a-134a). The district court therefore granted the plaintiff class's motion for summary judgment "on the issue of TWA's liability for violation of Title VII of the Civil Rights Act" (I J.A. 134a).[16]

2. The District Court's finding of jurisdiction.

On October 19, 1976, the date of its order granting summary judgment, the district court also entered an opinion and order denying TWA's motion to exclude certain members of the class for lack of subject matter jurisdiction (I J.A.

[14] *E.g.*, at pp. 29, 30, 37, 49.

[15] *E.g.*, at pp. 10, 11, 12, 14.

[16] In the American Airlines case, the district court, on April 28, 1976, granted summary judgment against the airline on the issue of liability, ruling that American's "no-mothers" policy violated Title VII (I J.A. 126a-129a).

On the same date, the district court ruled that ALSSA, Local 550, which had filed an opposition to the summary judgment motion, could no longer participate in the TWA and American Airlines cases because it had become defunct and had been succeeded by another local of the Transport Workers Union. III Supp. App. 113, in *In re Consolidated Pretrial Proceedings, supra*. The district court added that its order was without prejudice to the new union's moving to intervene. *Ibid.*

130a-132a).[17] The court held that TWA engaged in "continuing violations" with respect to female flight attendants discharged more than 90 days before they filed charges with the EEOC because their status as mothers prevented them from being rehired (I J.A. 130a-132a). The court thus concluded that it had jurisdiction over the claims of all class members *Ibid.*

F. The Decision Of The Court Of Appeals In No. 78-1545 That TWA Had Engaged In Illegal Sex Discrimination But That The District Court Lacked Jurisdiction Over The Claims Of Some Class Members

Upon TWA's interlocutory appeals of both orders,[18] the court of appeals reversed in part and ordered the case remanded (I J.A.136a).[19] The court first held that "TWA's no-motherhood policy . . . provides a clear example of sex

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[17] When TWA first raised this issue, the district court stated to TWA's counsel, "Can I ask how in the world a motion like this can come five years after the filing of the case?" (I J.A. 103a).

[18] The district court amended these orders by entering an appropriate 28 U.S.C. §1292(b) order on December 16, 1976 (I J.A.135a). American Airlines also took an interlocutory appeal, but while its appeal was pending, American and the plaintiff class reached a settlement, which the district court approved. The terms of the settlement were basically the same as those in the later settlement with TWA and, as in the TWA case, the union (Association of Professional Flight Attendants) intervened and argued that the district court lacked jurisdiction because of the time limits in former section 706(d). The district court rejected the union's argument, ordered retroactive competitive seniority and the court of appeals affirmed upon the union's appeal. *Airline Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978).

[19] *In re Consolidated Pretrial Proceedings In the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978), certiorari granted, No. 78-1545, March 9, 1981.

discrimination prohibited by §2000e-2(a)." 582 F.2d at 1145.[20] In so holding, the court rejected TWA's defense that it lawfully discriminated on the basis of sex because its no-mothers policy was a bona fide occupational qualification reasonably necessary to TWA's business. 582 F.2d at 1145-1147. Accordingly, the appellate court affirmed the order granting summary judgment in favor of the class on the violation issue. I J.A. 136a.

In regard to TWA's motion to exclude class members, the court of appeals held that the 90-day filing requirement in former Section 706(d) was jurisdictional and not a statute of limitations, that TWA thus could not have waived it, and that the district court had no jurisdiction over the claims of those members of the class who were terminated more than 90 days before charges were filed with the EEOC. 582 F.2d at 1150-1152. However, as to the members of the class who became mothers between 1965 and 1970 and who accepted ground positions rather than leave employment, the court held that TWA was guilty of a continuing violation. 582 F.2d at 1149-1150. The district court therefore had jurisdiction over these members of the class and the members who were terminated during the 90 days preceding the filing of charges with the EEOC. 582 F.2d at 1150.

The court of appeals stayed its mandate and the plaintiff class filed a certiorari petition (No. 78-1545) raising the issue whether the 90-day limit was subject to waiver or estoppel. TWA cross-petitioned (No. 78-1549).[21] On June 4, 1979, this

[20] The court pointed out that the plaintiff class challenged only TWA's policy of requiring mothers to accept ground positions or resign, not the company's policy of requiring pregnant flight attendants to withdraw from flight duty. 582 F.2d at 1145.

[21] TWA's cross-petition raises four issues: (1) whether its no-motherhood policy violated Title VII; (2) whether plaintiff class was entitled to summary judgment on the ground that TWA's defense of bona fide occupational qualification raised no genuine issues of material fact; (3) whether any remedies should be prospective only; and (4) whether the court of appeals correctly held that TWA was

Court granted petitioners' joint motion to defer consideration of the certiorari petitions pending completion of settlement proceedings in the district court. Pet. App. No. 80-951, at 3a.

G. The 1979 Settlement Agreement

1. Designation of subclass A and subclass B.

At the suggestion of the plaintiff class and TWA, the district court on June 27, 1979, designated two subclasses in connection with a proposed settlement of the case (II J.A.2-4). Subclass A consisted of all former TWA flight attendants terminated pursuant to TWA's no-mothers policy on or after March 2, 1970, and those discharged between July 2, 1965, and March 2, 1970, who were reinstated in ground duty positions (*id.* at 3). There are approximately 30 persons in subclass A (II J.A.9). (With respect to the claims of these individuals, the court of appeals held that the district court had jurisdiction.) Subclass B consisted of all other TWA flight attendants terminated after July 2, 1965, pursuant to the same policy (*id.* at 3). There are approximately 400 persons in subclass B (*id.* at 9).

2. The Proposed Settlement Agreement and the Orders of the District Court.

The proposed settlement agreement dated June 18, 1979, is set forth in Pet. App. No. 80-951, at pp. 23a-37a. It provides that members of subclass A will receive a pro rata portion of $1.5 million and that members of subclass B will share $1.5 million (*id.* at 26a-27a).[22] Each class member who is "ready, willing and qualified" will be re-employed as a flight attendant after retraining (*id.* at 26a) and will be credited with

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guilty of a continuing violation in regard to those class members who transferred to ground positions. Pet. for a Writ of Certiorari, No. 78-1549, at p. 2.

[22] The pro rata portion due each class member is to be determined by a formula that takes into account lost earnings (*id.* at 28a).

"company seniority" from the date of her termination, less the time during which she was pregnant (*id.* at 29a).[23]

The settlement agreement also provided that each re-employed class member would be credited with "full occupational (union) seniority" unless there was a timely objection by an interested party, in which event the issue of retroactive competitive seniority would be left for the court to decide in its discretion pursuant to Section 706(g) of Title VII, without TWA taking any position on the issue (*id.* at 29a). This portion of the agreement was amended to provide that the issue of accrued seniority was also to be decided by the court, with TWA remaining neutral. (*id.* at 21a).

Upon being notified of the proposed settlement, the Independent Federation of Flight Attendants (IFFA), which in April 1977 became the third collective bargaining agent for TWA's flight attendants since 1970, intervened (II J.A.11). While TWA stood aside, the plaintiff class and IFFA called witnesses, presented documentary evidence, submitted briefs and presented oral argument on the issue of retroactive competitive seniority (II J.A.15-190). The evidence showed that TWA employed 6,963 flight attendants and that the largest potential number of returning subclass B members was 172 (II J.A.137-138).[24] Under the terms of the settlement agreement, re-employment of the returning class members would occur only as vacancies arose, "provided that no flight attendant having greater seniority desires to fill such vacancy" (Pet.

[23] Any class member who does not become re-employed will receive twelve trip passes "for use at any time or times during her lifetime" (*id.* at 32a).

[24] The *potential* number of returning members of subclass A was set at 33 (II J.A.137). As will appear below, IFFA does not challenge the grant of retroactive seniority to subclass A members; its arguments on the two issues presented in its petition for certiorari specifically exclude subclass A. See Pet. for a Writ of Certiorari, No. 80-951, at pp. 9 n. 11, 19 n. 15; and this Court's order dismissing the writ in regard to the third issue presented in the union's Petition. II J.A.213.

App. No. 80-951, at 34a). No incumbent flight attendant would lose his or her job as a result of the settlement and testimony at the hearing indicated that "providing positions for these reinstated attendants would normally be possible as a result of normal attrition of workers in less than half a year" (Pet. App. No. 80-951, at 10a).

After considering the evidence, the district court issued two orders, one approving the settlement and dismissing the action and another awarding retroactive competitive seniority to those members of the class who become re-employed (Pet. App. No. 80-951, at 16a-19a). With respect to the award of retroactive seniority, the court found that this would "not have an unusual adverse impact upon currently employed flight attendants" (*id.* at 18a-19a).

Because the union appealed both orders of the district court, TWA refused to implement the settlement agreement. The agreement provided that the "Final Order Date," which triggered implementation, would be the date on which the district court's order implementing the settlement was no longer subject to judicial review (*id.* at 25a, 36a). The settlement agreement provided further that on the "Final Order Date," the plaintiff class and TWA would dismiss their certiorari petitions pending in this Court (*id.* at 35a).

H. The Decision Of The Court Of Appeals Sustaining The District Court's Orders

On appeal, IFFA argued that the district court lacked jurisdiction to approve the settlement and to order retroactive seniority with respect to subclass B (Pet. App. No. 80-951, at 5a). Relying on its earlier opinion in regard to a similar settlement in the American Airlines case,[25] the court of appeals held that the uncertainty of the jurisdictional issue, which was still open in light of the pending certiorari petition in No.

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[25] See note 18 *supra*.

78-1545 and its stay of the mandate, the facts that the courts of appeals were split on the issue and that the Supreme Court had not yet decided it, and the principles favoring settlement of Title VII cases, led to the conclusion that the parties should not be forced to litigate further the jurisdictional issue (*id.* at 9a). As to whether the settlement was fair and reasonable, the court held that "the settlement serves the public policy of remedying past acts of sex discrimination" (*id.* at 9a) and that there would be no unusual adverse impact from the award of retroactive seniority in view of the fact that the returning members of the class would comprise, at most, only three percent of the flight attendants employed by TWA (*id.* at 9a-10a).

SUMMARY OF ARGUMENT

I.

Contrary to the union's contentions, TWA did not bargain away seniority rights of incumbent employees in reaching a settlement with plaintiffs. The union's objection here is aimed not at the settlement agreement, but at the separate court order awarding seniority after a hearing between the union and the class. Moreover, in this Court the union cannot object to the seniority awarded to all members of the class; it is confined to protesting only the award to the members of subclass B. The district court's orders upholding jurisdiction over the claims of all class members and finding that each member had been the victim of a Title VII violation were still in effect despite the ruling of the court of appeals. TWA's appeals were interlocutory and the court of appeals had stayed its mandate after holding that the claims of subclass B members were jurisdictionally defective. Thus, at the time of settlement, there were outstanding findings of jurisdiction and violation. The question of remedy remained. The settlement agreement did not confer jurisdiction on a court that had already found it had jurisdiction. The only position the union can take is that the district court should have been persuaded by the not-yet-effective decision of the

court of appeals about the meaning of former Section 706(d). Since the court of appeals misconstrued that provision, the district court correctly proceeded to order the remedy of retroactive seniority.

II.

Former Section 706(d) is not a jurisdictional requirement but is a statute of limitations subject to waiver and estoppel. It is written in the standard language of a statute of limitations and the relevant legislative history shows conclusively that Congress intended it to be treated as such. This Title VII provision was modeled after the comparable timely-filing provision in the National Labor Relations Act, which Congress and the courts have considered a statute of limitations, not a jurisdictional requirement. The prior decisions of this Court in Title VII cases are firmly against treating the time limit involved here as jurisdictional. The Court has held that the timely-filing requirement has the same function and purpose as a statute of limitations, that there is no necessity for each class member to comply with it in order to have their claims adjudicated and that Congress may constitutionally expand the Title VII time limits and apply them retroactively because the running of a statute of limitations does not extinguish the underlying claim.

Although we believe that TWA's failure to raise noncomplaince with the time-limit as an affirmative defense and its earlier attempt to bind the members of subclass B to an improper settlement with the union resulted in TWA's relinquishment of the defense of statute of limitations, that is not at issue here in light of the settlement between the class and TWA. If, as we contend, former Section 706(d) was not jurisdictional, the union's various arguments against the seniority award to the members of subclass B must be rejected.

III.

Regardless of how this Court eventually construes former Section 706(d), the district court properly approved the settlement agreement and awarded retroactive competitive seniority. The union's arguments against the district court's order — that the court had no jurisdiction to act and that the members of subclass B were not victims of unlawful sex discrimination — depend on the proper construction of former Section 706(d), which we have already addressed. That was an open question in 1979, as it is today. Such uncertainty in litigation, which in this case was uncertainty over how this Court would rule, is one of the main reasons why parties settle their disputes. In Title VII cases, there is a strong Congressional policy in favor of settlement. The fact that issues raised by TWA's interlocutory appeal remained unresolved in 1979 did not give the union the sole right to determine what remedy was appropriate for the members of subclass B. The settlement agreement and the seniority order came in the wake of district court findings of jurisdiction and Title VII violations. Regardless of what the situation may be in some other case, the circumstances here were the same as if TWA had never sought interlocutory review and merely ended its dispute in view of the rulings against it. There is no reason why an employer should be forced to continue to litigate after it has been found in violation of Title VII. At the remedy stage, the union may intervene in an attempt to show that retroactive competitive seniority is not necessary to redress the employer's violations. The union in this case was given that opportunity and since the appropriateness of the seniority award is not an issue before the Court, the judgment of the court of appeals in No. 80-951 should be affirmed.

ARGUMENT

I.

THE UNION'S ARGUMENTS MISCONCEIVE THE NATURE OF THIS CASE

Throughout its Brief, the union persists in arguing about matters that bear no resemblance to the case actually before the Court. Time and again we are told that TWA "bargained away" the competitive seniority rights of incumbents, that the plaintiff class and TWA reached a settlement conferring such seniority rights on members of the class over the union's objection, that the district court ordered that the settlement supersede the collective bargaining agreement and that the union never agreed to the "portion of the 'settlement'" granting retroactive competitive seniority. There is scarcely a page of the union's Brief that does not contain such assertions. In the margin we quote but a few examples and provide citations to others.[26]

[26] Union Brief, at p. 16 (TWA "cannot diminish its own potential monetary liability by granting to Plaintiffs competitive status seniority inconsistent iwth [sic] the TWA-IFFA contract"); *id.* at 17 ("by forcing the settlement on IFFA and depriving it of its contractual rights"); *id.* at 18 ("the judgment below . . . permitted Defendant TWA to bargain away to the Plaintiffs rights which TWA did not own, namely, the competitive seniority rights of its incumbent flight attendants"); *id.* at 20 (TWA would "nullify" competitive seniority rights "in order to 'settle' the Plaintiffs' claims against it"); *id.* at 22 (the district court did not have authority to enter a "judgment at TWA's behest" granting retroactive competitive seniority); *id.* at 23 ("IFFA was entitled to reversal of so much of the proposed 'settlement' between TWA and Plaintiffs as would undermine" the portion of the collective bargaining agreement concerning competitive seniority); *id.* at 24 ("The courts below overrode the competitive status seniority provisions of the TWA-IFFA contract on the basis that it was a fair 'settlement.' But IFFA never agreed to, and in fact seriously objected to that portion of the 'settlement' ").

See, for additional examples, *id.* at 4, 5, 10, 11, 21, 26, 33, 34, 35 n.20, 36, 37, 38, 41, 42, 43, 50.

Whatever case the union has in mind, it is not this one. The union's objection here, and its only objection, is to conferring retroactive competitive seniority on returning members of the class — but that is not part of the settlement agreement approved by the district court. The union, in its intervention petition in the district court and in its Brief in this Court, disclaimed any interest in TWA's monetary award to the class or in its agreement conferring full company seniority on returning class members,[27] which is what the settlement agreement accomplishes. The grant of retroactive competitive seniority, however, is not part of the settlement agreement but is contained in a separate order entered by the district court (Pet. App. No. 80-951, at 18a-19a). Indeed, the settlement agreement specifically provided that TWA would remain neutral on this issue while the plaintiff class and the union litigated the question, a question that, according to the terms of the agreement, "will be determined by the Court in its discretion" (*id.* at 29a; see also *id.* at 21a). That is, in fact, what occurred when the district court entered its seniority order after full briefing, argument and an evidentiary hearing in which the union and the plaintiff class called witnesses and presented documentary evidence (see *id.* at 18a; II J.A.26-190).

While the union's objection is thus aimed at the district court's seniority order, not the order approving the settlement agreement or anything TWA "bargained away," the union's actual protest is even narrower than its Brief may lead the Court to believe. The only issues before the Court in No. 80-951 are the first two questions presented in the union's certiorari petition,[28] which concern the district court's supposed lack of authority to order retroactive seniority when there is neither subject matter jurisdiction (Question 1) nor a finding of a violation of Title VII (Question 2). The union itself has expressly restricted (as it must) its arguments on both issues to

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[27] See, *e.g.*, Union Brief, at pp. 4, 5, 16, 22, 43; II J.A.13.

[28] See this Court's Order of May 18, 1981 (II J.A. 212-213).

the members of subclass B,[29] only 172 of whom, at most, would be returning to the 7000-member bargaining unit (see p. 13 *supra*.)[30]

The union's Brief generates confusion about another important aspect of the case. The union states that "Without the settlement agreement, the [district] court would not have had any power to determine seniority" (Brief, at p. 41). This statement, which is the premise of much of the union's argument, is incorrect: *regardless of the settlement agreement, the district court quite clearly had jurisdiction to enter the seniority order at the time it did so.* To understand why this is so, one must consider the procedural posture of the case.

On October 19, 1976, the district court entered two orders, one holding that there was jurisdiction over all members of the plaintiff class[31] and the other granting partial summary judgment to the entire class on the issue whether TWA had engaged in unlawful sex discrimination in violation of Section 706(g) of the Act (I J.A.130a, 133a). Despite the union's statements to the contrary, the record could not be clearer that the district court found that TWA had unlawfully discriminated against *all* members of the class — those in subclass A and those in subclass B — by discharging them

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[29] See Petition for a Writ of Certiorari, No. 80-951. In discussing the first question presented, which concerns "jurisdiction," the union admitted "Our jurisdictional challenge, of course, relates only to Sub-Class B." *Id.* at 9 n. 11. In discussing the second question presented, which concerned the district court's power to award retroactive seniority "absent a finding of a violation," the union conceded "Our arguments here apply only to Sub-Class B." *Id.* at 19 n. 15. See also the union's Brief, at pp. 41-42, 49-50.

[30] With respect to the third question presented in the union's certiorari petition — whether the award of retroactive seniority was appropriate in light of the impact on incumbents — the Court dismissed the writ as improvidently granted (IIJ.A.213).

[31] At the time, the class was not split into subclass A and subclass B.

when they became mothers.[32] The district court's orders were, of course, interlocutory: having found a violation, the question of remedy remained to be decided.

TWA appealed both interlocutory orders to the court of appeals pursuant to 28 U.S.C. § 1292(b),[33] which expressly provides that a stay will occur only upon court order.[34] Neither the district court nor the court of appeals issued an order to stay the district court proceedings. The court of appeals affirmed the district court's ruling that TWA had violated Title VII but held that the 90-day filing requirement in former Section 706(d) could not be waived and that the claims of some class members were therefore barred.[35] However, the court of appeals stayed its mandate[36] and the plaintiff class and TWA filed certiorari petitions.

Thus, when the district court entered its seniority order on November 8, 1979, it did so on the basis that its previous orders finding jurisdiction and unlawful discrimination were still outstanding, that its proceedings had not been stayed and that no mandate had issued from the court of appeals. In these circumstances, the district court's power to grant relief

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[32] The union states that, with respect to the plaintiff class, there has been no "finding that they have been victims of a violation of Title VII" (Brief, at p. 29); that in "this case, of course, no acts of discrimination have been 'proved' " (*id.* at 30); that "TWA has specifically not admitted to any unlawful conduct, and hence the conduct must be treated as lawful" (*id.* at 49); and that "there has been neither the finding or admission of a discriminatory act" in this case (*ibid.*) The AFL-CIO, in its *amicus* Brief, commits the same mistake. See note 38 *infra*.

[33] See p. 10 *supra*.

[34] See also Fed. R. Civ. Pro. 62; Fed. R. App. Pro. 8(a); *Reed* v. *Rhodes*, 549 F.2d 1046, 549 F.2d 1050 (6th Cir. 1976); *O'Brien* v. *AVCO Corp.*, 309 F. Supp. 703, 705 (S.D.N.Y. 1965).

[35] Pet. App. No. 78-1545, at A1-A17.

[36] See Pet. App. No. 80-951, at 3a (court of appeals opinion); *id.* at 14a-15a (district court order).

under Section 706(g) did not depend on the settlement agreement. The district court quite clearly had jurisdiction to order retroactive competitive seniority for those flight attendants found by the court to have been victims of unlawful sex discrimination — namely, all members of the plaintiff class."

In sum, the issue here is *not* whether a district court can order retroactive competitive seniority without first finding unlawful discrimination. In this case, the district court made such a finding." The issue is *not* whether a district court can

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" The district court so held, stating that "Contrary to the Union's assertion, the filing of the *Consolidated* opinion with the Clerk of the Seventh Circuit does not constitute a final judgment order, and this court is therefore not presently forbidden from exercising its jurisdiction over the claims of Subclass B members." Pet. App. No. 80-951, at p. 15a (Order of September 14, 1979).

In the face of the procedural history described in the text and the foregoing Order, it is difficult to understand how the Union can assert in its Brief (at p. 38) "The District Court did not say whether it thought jurisdiction existed" and (somewhat inconsistently) that the district court "held that the policies favoring settlement allow a court to act despite a finding of a lack of subject matter jurisdiction" (*id.* at 37).

" The Brief of the AFL-CIO as *amicus curiae* is irrelevant to this case. It proceeds from an incorrect factual premise (AFL-CIO Brief, at p. 10), erroneously stating:

> No violation of Title VII has been found by the lower courts. There is only plaintiffs' allegation of such a violation. In the settlement agreement, the Company "expressly disclaims any liability in these lawsuits***." Pet. App. 25a. And, the only court ruling on the validity of plaintiffs' allegation is the holding of the court of appeals that the Title VII claims of the vast majority of those in the plaintiff class — all of whom under the court order at issue would be granted extra-contractual seniority — are time-barred. Pet. App. 40a-58a.

The AFL-CIO further contends that before a court may order retroactive competitive seniority, plaintiffs must prove their claims of unlawful discrimination (*id.* at 13; see also *id.* at 11). Plaintiffs in this case did just that, which is why the district court entered the order granting summary judgment in their favor on the violation issue — a finding of which the AFL-CIO is apparently unaware.

order such relief despite holding that it had no subject matter jurisdiction. When the district court granted retroactive seniority in 1979, the court's 1976 order that it had jurisdiction over the claims of all members of the class was still in effect. The issue is *not* whether an employer can "bargain away" seniority rights of incumbent employees over the union's objection. Retroactive seniority was not bargained away by TWA in the settlement agreement; it was awarded by the court because the plaintiff class prevailed in an evidentiary hearing with the union.

The only position left open to the union is one it has not expressly taken in this Court — namely, that the district court, when presented with the proposed settlement agreement and the separate question whether to order retroactive competitive seniority in 1979, should have reversed its prior finding of jurisdiction in anticipation of a denial of the class's certiorari petition (No. 78-1545) or this Court's affirmance of the 1978 ruling of the court of appeals after granting the writ. This was the union's argument in the district court (II J.A. 15-21; Tr. of July 31, 1979, at pp. 37-44, 64-69) and we have two responses. First, the court of appeals' jurisdictional ruling was in error[39] and the district court therefore properly refused to be persuaded by it. If we are correct about this, the Court need proceed no further in disposing of this case,[40] as the union concedes.[41] Second, regardless of how the Court in-

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[39] This is the issue presented in No. 78-1545. The union argues in support of the court of appeals; the AFL-CIO, as *amicus curiae*, takes no position on this question.

[40] A remaining issue might be whether the remedy of retroactive competitive seniority was otherwise appropriate. But this is the third question presented in the petition in No. 80-951 and is the question on which the Court dismissed the writ as improvidently granted (II J.A. 213).

[41] See the union's Brief, at p. 43 ("Indeed, if the parties had not used the settlement agreement to confer jurisdiction for the purposes of a seniority grant, there would have been no one objecting to the court's actions."). As we later discuss (pp. 36-37 *infra*) the agreement had no such effect.

terprets the 90-day filing rule in former Section 706(d), the issue was sufficiently in doubt in 1979 when the class and TWA entered into the settlement that the parties could agree to end their dispute, leaving to the district court's discretion whether to order retroactive seniority in light of its outstanding orders that there was jurisdiction and that all members of the class were victims of unlawful sex discrimination.

II

THE TIMELY FILING OF CHARGES WITH THE EEOC PURSUANT TO FORMER SECTION 706(d) IS NOT A JURISDICTIONAL REQUIREMENT

In discussing why the 90-day filing requirement of former Section 706(d) — now 180 days under Section 706(e)[42] — is subject to the equitable doctrines of waiver and estoppel, we follow a path clearly marked by the thorough analysis in *Coke* v. *General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981) (*en banc*), which twenty-three of the judges of that court joined.[43] *Coke* held that Title VII's requirement that an aggrieved person file a claim with the EEOC within 180 days of the alleged discriminatory act is not, in a subsequent federal civil action, a jurisdictional requirement[44] but is in the nature of a statute of limitations subject to equitable tolling.[45]

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[42] See note 13, *supra*.

[43] The remaining two judges concurred in the result. 640 F.2d at 596.

[44] We use the phrase "jurisdictional requirement" to mean a requirement that, if not met, deprives the court of subject matter jurisdiction, that may be raised by any party or the court at any stage of the litigation and that is not subject to the equitable doctrines of waiver and estoppel.

[45] Although the actual issue in *Coke* concerned the comparable 180 day time period in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(d)(1), the court of appeals reached its result on the basis of its analysis of the 180-day filing requirement in Title VII. The union agrees in its Brief (at p. 41, n. 23) in this Court with our statement in the text about the holding of *Coke*,

In so holding, *Coke* overruled the decision in *McArthur* v. *Southern Airways*, 569 F.2d 276 (5th Cir. 1978), which had set aside a settlement agreement on the basis that there was no jurisdiction over the claims of the class members because they had not complied with the 180-day limit of Section 706(e).[46] 640 F.2d at 596; *Oaxaca* v. *Roscoe*, *supra*, 641 F.2d at 388.

In reaching its decision, the court of appeals in *Coke* reviewed the relevant decisions of all the circuits and found that the Seventh Circuit, as a result of its 1978 opinion in this case (*In re Consolidated Pretrial Proceedings In the Airline Cases, supra*) is the only court of appeals currently holding that unless the charge filed with the EEOC is timely, a court in a later civil action has no subject matter jurisdiction. 640 F.2d at 590-591.[47]

As *Coke* pointed out, even the Seventh Circuit may be retreating from this position[48] — and for good reason. It

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which the Fifth Circuit confirmed in *Oaxaca* v. *Roscoe*, 641 F.2d 386 (5th Cir. 1981).

[46] The union had argued that *McArthur* was indistinguishable from this case. Petition for a Writ of Certiorari, No. 80-951, at p. 15.

[47] *Coke* cited decisions from the courts of appeals for the Second, Third, Sixth, Eighth, Ninth, Tenth and District of Columbia Circuits holding or indicating that the timely-filing rule is not a jurisdictional requirement. *Ibid.*; see also the post-*Coke* opinions in *Pierce* v. *County of Oakland*, _____ F.2d _____ (6th Cir., slip op. No. 79-1684, July 2, 1981); *Carlile* v. *Smith Routt School District*, _____ F.2d _____ (10th Cir., slip op. No. 80-1330, July 6, 1981). Cf. *Heymann* v. *Tetra Plastics Corp.*, 640 F.2d 115 (8th Cir. 1981), decided shortly before *Coke* and not cited in *Coke*, which uses the word "jurisdiction" but analyses the 180-day requirement in the terms of a statute of limitations.

[48] 640 F.2d at 590 n. 11, citing *Movement for Opportunity and Equality* v. *General Motors Corp.*, 622 F.2d 1235, 1241 (7th Cir. 1980).

Coke also observed that on the same day in 1978 that the court of appeals rendered its opinion in this Title VII case, it decided that

would be strange indeed if Congress had intended the 90-day rule to be treated as a jurisdictional requirement rather than a statute of limitations. Former Section 706(d) was not even framed in jurisdictional terms. It read "A charge under this section shall be filed within ninety days after the alleged unlawful employment practice occurred. . . ." This is language typical of statutes of limitations.[49] In a separate subsection, Congress addressed the jurisdiction of federal courts over civil actions, as distinguished from "charges" filed with the EEOC. The jurisdictional provision of Title VII states now, as it did in 1970, "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this sub-chapter."[50] There is nothing in this provision that makes an exception to the courts' jurisdiction for "charges" filed with the EEOC beyond the 90-day limit. So long as the subject matter of the suit arises under Title VII, the district courts have subject matter jurisdiction. From all that appears on the face of Title VII, the legislation follows the common statutory form of defining the jurisdiction in one section and providing a statute of limitations in another.

While the legislative history of the 90-day rule in former Section 706(d) is sparse,[51] it too suggests that Congress considered the provision to be a statute of limitations.[52]

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the comparable ADEA 180-day filing rule was not a jurisdictional requirement. *Kephart* v. *Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978). See note 57 *infra*.

[49] See Note, *Developments in the Law — Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1186 (1950).

[50] 42 U.S.C. §2000e-5 (f)(3).

[51] See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 820 (1980).

[52] Senator Humphrey, comparing H.R. 7152 and the Senate bill, S. 656, which the Senate passed, referred to its 90-day time period as a "period of limitation." 110 Cong. Rec. 12723 (1964). Senator Case, one of the Senate floor managers of the House bill, stated that the purpose of the time period was to prevent the pressing of

Moreover, when the 90-day period was extended to 180 days in 1972, Congress firmly indicated that the time limit was to be treated merely as a period of limitations, not a jurisdictional absolute.[13] The Senate Labor Committee's Section-by-Section Analysis stated:

> Section 706(e) — This subsection prescribes the time limits for the filing of a charge. . . . This subsection would permit charges to be filed within 180 days of the alleged unlawful practice — a limitation period similar to that contained in the Labor-Management Relations Act, as amended (29 U.S.C. § 160(b)).

S. Rep. No. 415, 92d Cong., 2d Sess. 36-37 (1971). The Minority View of the House Labor Committee's Report (H.R. Rep. No. 238, 92d Cong., 2d Sess. 65-66 (1971)), also referred to the filing period as a "statute of limitations," supported the extension to 180 days and observed that "this is identical to the statute of limitations under the National Labor Relations Act. . . ."

The analogy between the timely-filing provision for unlawful employment practice charges under Title VII and for

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"stale" claims (110 Cong. Rec. 7243 (1964)), "an end usually associated with a statute of limitations." *Coke* v. *General Adjustment Bureau, Inc., supra*, 640 F.2d at 593. See *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); Jackson & Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 Geo. L. J. 811, 847 (1979).

[13] We can perceive no basis for interpreting the 90-day rule in effect until 1972 differently than the 180-day rule in effect since then. We therefore believe it appropriate to seek guidance from the legislative history surrounding the 1972 amendment although only the pre-1972 version of the timely-filing provision is actually involved in this case. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 686 n. 7 (1979); and *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980), cited in *Coke* v. *General Adjustment Bureau, Inc., supra*, 640 F.2d at 594.

unfair labor practice charges under the NLRA[34] is particularly significant because the courts of appeals have uniformly held that the NLRA provision is a statute of limitations subject to recognized equitable doctrines, not a restriction on the jurisdiction of the National Labor Relations Board.[35] Even in the absence of the kind of specific legislative history we have here, this Court has interpreted the original and amended versions of Title VII by relying on cases decided under the NLRA, which was "the model for Title VII's remedial provisions. . . ."[36] The 1972 legislative history thus serves to confirm what this Court's decisions would, in any event, have dictated — that the pre-1972 timely filing requirement at issue here, like the 180-day provision currently in effect, is to be treated as a statute of limitations, as is its counterpart in the NLRA.[37]

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[34] Section 160(b) of the National Labor Realtions Act, 29 U.S.C. §160(b), provides in relevant part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge."

[35] See, in addition to *Laffey* v. *Northwest Airlines, Inc.*, *supra*, 567 F.2d at 475 n.351, and the cases there cited. *A. H. Belo Corp.* v. *NLRB*, 411 F.2d 959 (5th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970).

[36] *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 366 (1977). See also *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979); *Franks* v. *Bowman Transportation Co., Inc.* 424 U.S. 747, 768-770 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 & n.11, 420 & n.12 (1975).

[37] Although further evidence of Congress' intent may be unnecessary, there is more. In *Coke*, the court of appeals quoted the Final Conference Committee Section-By-Section Analysis of the 1972 amendments to Title VII, 118 Cong. Rec. 7166, 7167 (1972), which characterized the filing period as a "time limitation." 640 F.2d at 593-594. See also Jackson & Matheson, *supra*, 67 Geo. L. J. at 845-846.

Moreover, with respect to the 180-day filing requirement in the Age Discrimination in Employment Act of 1967, 29 U.S.C. §626(d)(1), which was modeled after Title VII (see *Oscar Mayer &*

As against this, the union cites four opinions of this Court, using the term "jurisdictional" or "jurisdiction" in reference to the timely-filing requirement.[58] In one of these opinions, however, the Court also characterized the time limit rule as a "limitations period"[59] and in another the Court also referred to it as a period of "limitations."[60] Moreover, the union fails to point out that in every case decided after those it cites, the Court has used "the limitations label to the exclusion of the jurisdictional label" in referring to the timely-filing requirement.[61]

Co. v. *Evans*, 441 U.S. 750 (1979); *Coke* v. *General Adjustment Bureau, Inc.*, *supra*, 640 F.2d at 587)), Congress made clear when it amended Section 626(d)(1) in 1978 that the timely filing requirement "is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act." H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 12 (1978), quoted in *Coke*, *supra*, 640 F.2d at 594.

[58] See union Brief, at p. 45, citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973), where the phrase "jurisdictional prerequisite" first appeared; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), which cited *McDonnell Douglas* when it used the phrase; and *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976), which relied on *Alexander*; and the footnote in *United Airlines, Inc.* v. *Evans*, 431 U.S. 553, 557 n.9 (1977).

[59] See *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, 429 U.S. at 240 & n.14.

[60] *United Airlines, Inc.* v. *Evans*, *supra*, 431 U.S. at 560. Justice Marshall, joined by Justice Brennan, dissenting, stated that the only question in the case was whether the complaint was barred by the "statute of limitations" in Section 706(e). 431 U.S. at 561.

[61] *Coke* v. *General Adjustment Bureau, Inc.*, *supra*, 640 F.2d at 588, citing *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 371-372 (1977) ("statute of limitations"); *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385, 391-392 (1977); *Mohasco Corp.* v. *Silver*, *supra*, 447 U.S. at 818-822; *Delaware State College* v. *Ricks*, _____ U.S. _____, 101 S. Ct. 498 (1980).

Still more important, the relevant decisions of this Court are inconsistent with the union's argument that the timely-filing provision is a jurisdictional absolute.[62] In *Delaware State College* v. *Ricks, supra*, 101 S.Ct. at 503, the Court held that the 180-day time limit for filing charges with the EEOC and the state statute of limitations there involved had the same function and purpose:

> The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past.

Since, as *Ricks* holds, this timely-filing requirement in Title VII is for the protection of employers,[63] unless the employer raises it as an affirmative defense in answer to a Title VII suit there is no reason for a court to consider it (see Rule 8(c), Fed. Rules Civ. Pro.) This is why in *Mohasco Corp.* v. *Silver, supra*, the Court noted that "the plaintiff had missed a related Title VII time provision by one day" but "rather than dismissing the action sua sponte, which the Court surely would have done if it considered the requirement to be a mat-

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[62] The union suggests that the 90-day rule might be both a statute of limitations and jurisdictional. Brief, at p. 45. This is, of course, a contradiction in the union's terms. Regardless of labels, the issue is whether the timely-filing requirement is subject to waiver and estoppel. The union uses "jurisdiction" to mean non-waivable (Brief, at p. 40) and "statute of limitations" to mean an affirmative defense that may be waived (*id.* at 49 n.30). The union's suggestion that the 90-day rule can be both leads to the odd conclusion that it is both unwaivable and waivable.

We add one caveat. As we discuss later, in other contexts the Court has labelled some requirements "jurisdictional" but subject to waiver; so far as we are aware, however, it has never held that a statute of limitations may not be waived.

[63] See *Burnett* v. *New York Central Railroad Co.*, 380 U.S. 424, 428 (1965) (such time limits are "primarily designed to assure fairness to defendants").

ter of subject matter jurisdiction,"[64] the Court merely stated in a footnote (447 U.S. at 811 n.9):

> Petitioner did not assert respondent's failure to file the action within 90 days as a defense.

Furthermore, if the timely filing of a charge with the EEOC is a jurisdictional requirement, as the union contends, "then each class member should be required to file a claim before participating in a Title VII class action, just as each class member must satisfy the jurisdictional amount in other class actions."[65] But the Court had held that not all class members in a Title VII class action need file a charge with the EEOC, let alone a timely charge.[66] As a result, the Court ruled in *United Airlines, Inc.* v. *McDonald, supra*, that the respondent-stewardess could intervene after judgment to appeal the district court's refusal of class certification in a Title VII action challenging the airline's "no-marriage" policy. Before intervening, the stewardess had not filed a timely charge with the EEOC. 432 U.S. at 389-390. Although the union's argument here would have required rejection of her claim because there was no subject matter jurisdiction, the Court analyzed the case on the basis that the Title VII time limits were "statutes of limitations."[67] Since the stewardess sought review of the denial of the class action status, "[s]uccess in that review would result in the certification of a class,

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[64] *Coke* v. *General Adjustment Bureau, Inc., supra*, 640 F.2d at 589.

[65] *Coke* v. *General Adjustment Bureau, Inc., supra*, 640 F.2d at 589, citing *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973); *Snyder* v. *Harris*, 394 U.S. 332 (1969).

[66] See *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 414 n.8 (1975); *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 771; *United Airlines, Inc.* v. *McDonald, supra*, 432 U.S. at 389 n.6.

[67] Both the 180-day limit for filing charges with the EEOC and the requirement that a civil action be filed within 90 days of receipt of a right-to-sue letter from the EEOC were involved. 432 U.S. at ____ n.11.

the named members of which had complied with the statute of limitations [Section 706(e)]; the respondent is a member of that class against whom the statute had not run at the time the class action was commenced." 432 U.S. at 392.[48]

The Court's decision in *Electrical Workers* v. *Robins & Myers, Inc., supra,* is also contrary to the union's jurisdictional argument, as *Coke* and other courts of appeals' opinions have pointed out.[49] In holding that it was constitutional for Congress' 1972 extension of the 90-day rule to 180 days to be applied retroactively, the Court quoted from and relied on *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 315-316 (1945), which held that under the Fourteenth Amendment, Congress is permitted to lift "the bar of a statute of limitations so as to restore a remedy lost through mere lapse of time. . . ." 429 U.S. at 243-244. The holding of *Chase*, on which the Court rested its decision in *Robbins & Myers*, was that statutes of limitations concern matters of remedy and do not erase the underlying claim. 325 U.S. at 314-316.

Thus, the language of former Section 706(d) and of Title VII, the legislative history of the original and amended provision, the comparable timely-filing requirements in similar legislation, the purpose of the provision and the relevant holdings of this Court lead to but one conclusion — that the 90-day requirement is in the nature of a statute of limitations subject to waiver and estoppel. There are no contrary indications. The fact that on several earlier occasions the Court in

[48] The dissenting opinion of Justice Powell, in which the Chief Justice and Justice White joined, also analyzed the Title VII timely-filing requirement in terms of a "statute of limitations," but reached a different result in light of the strong policy favoring settlements in Title VII cases. 432 U.S. at 396. In support of this policy, Justice Powell cited the Seventh Circuit's affirmance of the settlement and seniority award in the American Airlines case that had been consolidated with this case. *Id.* at 401; see note 18 *supra.*

[49] In addition to *Coke* (640 F.2d at 588), see *Smith* v. *American President Lines, Ltd.*, 571 F.2d 102, 108-109 (2d Cir. 1978); *Hart* v. *J. T. Baker Chemical Co.*, 598 F.2d 829, 833 (3d Cir. 1979).

dictum used the term "jurisdictional" when it referred to the requirement of timely filing with the EEOC (see p. 28 *supra)* lends nothing to the union's position. The Court has spoken of the "jurisdictional" requirement of exhaustion of administrative remedies under other statutes, but has held that this requirement may be waived or even disregarded in certain circumstances.[70]

What the union seeks through its characterization of former Section 706(d) as "jurisdictional" is the advantage of the maxim that any party, or the court on its own motion, may raise a question of jurisdiction over the subject matter at any stage of the litigation. Yet, "[a]s many commentators have noted. . .this fetish of federal jurisdiction is wholly inconsistent with sound judicial administration and can only serve to diminish respect for a system that tolerates it."[71]

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[70] Only last Term, the Court in *Schweiker* v. *Wilson*, _____ U.S. _____, 101 S. Ct. 1074 (1981), a Social Security Act case, noted that the district court had dismissed the complaints "for lack of subject matter jurisdiction on the ground that the plaintiffs had failed to exhaust" their administrative remedies but that the court of appeals reversed, "holding that the Secretary had waived any requirement of exhaustion. . . ." 101 S. Ct. at 1079. See also *Weinberger* v. *Salfi*, 422 U.S. 749, 764-765 (1975).

[71] American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 366 (1969). The ALI concluded that it was consistent with Article III of the Constitution to foreclose the raising of jurisdictional questions after the pleadings had closed and that it was "necessary and proper" to "require issues of jurisdiction to be timely raised, and to prevent their use to take unfair advantage of opposing parties or to impede the administration of justice." *Id.* at 368.

Some courts have found it intolerable to allow a party first to submit to the court's jurisdiction for the purpose of trying to gain an advantage and then to take the inconsistent position of opposing jurisdiction when the advantage is no longer available. See, *e.g.*, *Alger* v. *Hayes*, 452 F.2d 841, 844-845 (8th Cir. 1972), holding that the defendant was estopped from asserting lack of jurisdiction. TWA's incumbent flight attendants are in the same position as the

Why Congress would have intended to perpetuate such a "fetish" in "a scheme in which laymen, unasssisted by trained lawyers initiate the process" (*Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972)), the union does not explain.[72] Why Congress would have intended such a result when timely-filing provisions in other similar legislation are treated as waivable statutes of limitation the union cannot explain.[73].

In this case, TWA did not raise failure to comply with former Section 706(d) as a defense.[74] When it sought leave to amend its answer four years after the complaint had been filed, the district court expressed considerable doubt that TWA could overcome the plaintiff class' argument that TWA had

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defendant in that case, having first invoked the court's jurisdiction through their collective bargaining representative and then, nine years later, having opposed settlement of the case on jurisdictional grounds.

[72] It is, we submit, incredible to suppose that although in Title VII "Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims," *Carson* v. *American Brands, Inc.*, _____ U.S. _____, 101 S. Ct. 993, 998 n.14 (1981), Congress intended to prevent employers from waiving the timely-filing requirement while they seek to settle with their aggrieved employees. Yet that is where the union's argument leads.

[73] In addition to time limits in the ADEA and NLRA, which we have previously discussed, see, *e.g.*, the 60-day period of limitations in the Social Security Act, 42 U.S.C. 405(g), which this Court has found to be a waivable statute of limitations (*Weinberger* v. *Salfi*, *supra*, 422 U.S. at 763-764; *Matthews* v. *Eldridge*, 424 U.S. 319, 328 n.9 (1976)); and the three-year timely-filing requirement in the Federal Employers' Liability Act, 45 U.S.C. §56, construed in *Burnett* v. *New York Central R. Co.*, *supra*.

[74] "Generally, a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case." 5 Wright & Miller, *Federal Practice and Procedure* §1278, at p. 339 (1969). Statute of limitations is an affirmative defense under Rule 8(c), Fed. Rules Civ. Pro.

waived this defense (I J.A. 101a); thereafter, TWA never filed an amended answer. Moreover, in 1971 TWA had sought to have the class certified to include those members who had not filed timely charges with the EEOC. TWA did this in an attempt to bind those class members to its costless settlement with the union (Local 550) — a settlement set aside by the court of appeals because of the union's inadequate representation of the same members of the class. See p. 7, *supra*.

While we believe that in these circumstances TWA waived any defense under former Section 706(d) or was estopped from asserting such a defense, it is unneccessary for the Court to resolve the matter. As we have explained, the pivotal question is whether the district court, before it issued the seniority order challenged by the union, should have been persuaded by the 1978 jurisdictional opinion of the court of appeals (see pp. 22-23 *supra*). Our discussion above demonstrates, we submit, that the court of appeals misconstrued former Section 706(d) and that the district court wisely chose not to follow that ruling. Had the court of appeals reached the correct result in 1978, the only remaining question for the district court on this subject would have been whether TWA could effectively raise the affirmative defense of failure to file within 90 days. Viewed in this light, the settlement agreement represents TWA's relinquishment of its right to litigate further the waiver and estoppel questions.[75] The union offers no reason why, after nine years of litigation, TWA should have been forced to continue pursuing this defense when all indications were that it would have been rejected. See I J.A. 100a-101a. Since the union's various arguments in this Court are based on the assumption that the district court had no jurisdiction over the claims of subclass B members because former Section 706(d) is jurisdictional and can never be waived, and since the assumption is incorrect, the Court need proceed no further in disposing of this case.[76]

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[75] See *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971).

[76] See the union's concession on this subject, quoted at note 41 *supra*.

III.

REGARDLESS OF HOW THIS COURT CONSTRUES FORMER SECTION 706(d), THE DISTRICT COURT PROPERLY APPROVED THE SETTLEMENT AND ORDERED RETROACTIVE SENIORITY

In the typical case, a court considering a proposed settlement agreement would not "decide the merits of the case or resolve unsettled legal questions."[17] Quite obviously, this is not a typical case. The "unsettled" legal question we have just discussed — whether former Section 706(d) is subject to waiver or estoppel — is now before the Court despite the settlement agreement of 1979 in which TWA and the plaintiff class agreed to relinquish their opportunity to have the Court decide this issue.[18] In this part, however, we shall confine our arguments to showing why the district court properly approved the settlement and ordered retroactive seniority regardless of how this Court ultimately construes that statutory provision.

The Court will find little in the union's Brief that is relevant to this subject.[19] While the union appears to devote the bulk of its Brief to an attack directed solely at the settlement agreement, the union's objections are in fact of a far different

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[17] *Carson* v. *American Brands, Inc.*, *supra*, _____ U.S. at _____ n.14, 101 S. Ct. at 998 n.14.

[18] As we have indicated (pp. 12-14 *supra*), the settlement agreement provided that TWA and the plaintiff class would dismiss their pending certiorari petitions (Nos. 78-1545, 78-1549) when the district court's order approving the settlement was no longer subject to judicial review. The union's appeal of this order (and the order granting retroactive seniority) forestalled implementation of the settlement agreement and, thus, the parties' dismissal of their certiorari petitions, one of which (No. 78-1545) the Court subsequently granted and the other of which is still pending (II J.A. 212-213).

[19] See also our earlier discussion, at pp. 17-23 *supra*.

nature. When we are told that the parties "used the settlement agreement to confer jurisdiction" on the district court,[40] we know that the union is either operating under a misconception about the procedural posture of this case or is merely arguing that former Section 706(d), should be considered jurisdictional without directly saying so. We know this because the district court's previous ruling, not the settlement agreement, supplied the jurisdictional predicate for its orders ending the case in 1979,[41] as both the district court[42] and the court of appeals held.[43] The parties could hardly confer jurisdiction on a court that had already ruled it had jurisdiction.

We know as well that when the union protests the order approving the settlement agreement (or, more accurately, the separate order granting seniority) on the basis that there had been no finding that TWA violated the Title VII rights of the class members,[44] the union must mean this and nothing more: that subclass B members were not the victims of TWA's illegal actions because, under former Section 706(d), the district court should not have exercised jurisdiction over their claims. Otherwise, the union's assertions fly in the teeth of the district court's decision on summary judgment that *all* members of the class were victims of Title VII violations by TWA (I J.A. 133a-134a).

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[40] Union Brief, at p. 43; see also *id.* at 37-44.

[41] As we previously noted (p. 21 *supra*), the court of appeals stayed its mandate after ruling in 1978 that the claims of subclass B members were jurisdictionally barred, and thus left standing the district court's 1976 order that it had jurisdiction over these claims.

[42] Order of September 14, 1979 (Pet. App. No. 80-951, at 13a-15a).

[43] See *id.* at 4a, 8a. The union makes a quite telling concession, as we have previously mentioned: "Indeed, if the parties had not used the settlement agreement to confer jurisdiction for the purpose of a seniority grant, there would have been no one objecting to the court's actions" (Union Brief, at p. 43).

[44] See, *e.g.*, the Union's Brief, at pp. 28-30, 37, 49.

In sum, the arguments the union musters against the settlement and the seniority award depend on whether this Court construes Section 706(d) as a jurisdictional requirement. We have already addressed that issue and as we stated above, our arguments in this part proceed on the basis that regardless of the Court's eventual view of the statute, the judgment in No. 80-951 should be affirmed.

The uncertainty and cost of litigation, crowded dockets and the long wait for final judicial determination are the reasons why many cases are settled. This case is no exception. In reaching an agreement to end their dispute, the parties necessarily assessed the strengths and weaknesses of their respective legal and factual positions.[15] "Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States* v. *Armour & Co., supra*, 402 U.S. at 681.

In Title VII cases especially, the courts look with favor on such compromises.[16] As the Court recently stated, "In enacting Title VII Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims."[17] The settlement agreement here is consistent

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[15] See *Protective Committee for Independent Stockholders* v. *Anderson*, 390 U.S. 414, 434 (1968):

> Litigation and delay are always the alternative to settlement, and whether that alternative is worth pursuing necessarily depends upon a reasoned judgment as to the probable outcome of litigation.

[16] In general, "It is well recognized that settlement agreements are judicially favored as a matter of sound public policy." *Speed Shore Corp.* v. *Denda*, 605 F.2d 469, 473 (9th Cir. 1979). See *Williams* v. *First Nat'l Bank*, 216 U.S. 582 (1910).

[17] *Carson* v. *American Brands, Inc., supra*, ____ U.S. at ____ n.14, 101 S. Ct. at 998 n.14; see *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 44.

with the strong Congressional policy of ending Title VII controversies short of full litigation. The union's position is squarely against that policy.

There is no sound reason why the district court here should have refused to approve what the parties proposed. The fact that one of the points of dispute between TWA and the class had concerned the meaning of former Section 706(d) was not a sufficient basis for rejecting the settlement. In the summer of 1979, ultimate judicial resolution of that issue was in doubt. It depended then, as it does now, on the opinion of this Court. Neither side could have been *certain* of the outcome, no matter how strongly they believed in their contentions.

Such uncertainty, as we have said, is one of the primary reasons for compromise. This case, however, is somewhat unusual because the doubts about its outcome resulted from proceedings at the appellate level. The district court had found jurisdiction and a violation; the question of remedy remained. In these circumstances, to suggest that the parties could not settle the case, dismiss their certiorari petitions and leave to the district court's discretion the question of retroactive seniority is to argue that retroactive seniority may be awarded only *after* the appellate courts agree that the plaintiffs have a valid claim for relief. In other words, a Title VII class action such as this cannot be settled and seniority cannot be awarded until the case has been fully litigated at trial and on appeal — which is to say such cases will not be settled.[*]

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[*] For reasons that are far from apparent, the union makes the remarkable assertion that Title VII class actions could be settled without court approval despite the requirement of Rule 23(e), Fed. Rules Civ. Pro., that "a class action shall not be dismissed or compromised without the approval of the court. . . ." (Union Brief, at p. 43). In asserting that Rule 23(e) settlement approval is merely "convenient" and "not indispensable" (*ibid.*), the union could not be more mistaken. The general provision in Rule 41(a)(1) allowing voluntary dismissals without court approval specifically excepts

But seniority awards, even in fully litigated cases, are made *before* the underlying findings at the trial court level are tested on appeal. We are aware of no rule of law — the union certainly has cited none — requiring, in Title VII cases, that the district court withhold retroactive seniority relief unless the defendant-employer has exhausted all interloctory appeals. Yet the posture of this case before the district court in 1979 was the same as it would have been if TWA has not sought appellate review of the interlocutory orders and had instead settled the case in the face of the rulings against it.[89] We do not dispute that in such a case, the union could intervene as it did here for the purpose of demonstrating that an award of retroactive competitive seniority would be inappropriate. See *High* v. *Braniff Airways, Inc.*, 592 F.2d 1330, 1335 (5th Cir. 1979). We disagree, however, with the union's contention not only that it had a right to a hearing,[90] but also that it alone had the right to decide whether the plaintiffs were entitled to such relief.[91]

The union does not challenge this Court's decision in *Franks* v. *Bowman Construction Co., supra,* 424 U.S. at 777, that the remedy of retroactive seniority for victims of Title VII violations is "presumptively necessary."[92] Indeed, the

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Rule 23(e). See 7A Wright & Miller, *Federal Practice and Procedure* §1797, at 226-227 (1972).

[89] That is precisely what occurred in the American Airlines case, which had been consolidated with this case: the airline withdrew its interlocutory appeals and reached a settlement similar to the one involved here; the district court ordered retroactive competitive seniority after the union intervened; and the court of appeals affirmed. See note 18 *supra*. Justice Powell, joined by the Chief Justice and Justice White, dissenting in *United Airlines, Inc.* v. *McDonald, supra*, cited the court of appeals' opinion in American Airlines with approval, as we have mentioned. See notes 18, 68 *supra*.

[90] As we have discussed, the union presented documentary evidence, called witnesses and argued before the district court in this case (see p. 13 *supra*).

[91] See, *e.g.*, the union's Brief, at p. 36.

[92] See, *e.g.*, the union's Brief, at pp. 29-31, 37.

union does not contest the award of such relief to the members of subclass A.[93] With respect to subclass A, the union therefore must concede that the court's order does not "change the contractual seniority rules,"[94] deprive the union "of its contractual rights,"[95] nullify "valuable competitive status seniority rights" of incumbents,[96] or override "IFFA's collective bargaining agreement."[97] Yet the only difference between subclass A and the 172 members of subclass B who might return to the bargaining unit is the date on which they were fired for becoming mothers. The union's protest is thus not rooted in principles of collective bargaining. Its objection here, as elsewhere, is that the district court should have been persuaded by the 1978 ruling of the court of appeals or, at the least, should not have allowed the case to end before this Court had spoken. We can perceive no reason why such an objection entitles the union to decide whether to allow the seniority remedy for the members of subclass B.

In short, the union's complaint that the district court should have acquiesced in the 1978 appellate ruling excluding subclass B members did not convert the union into the final arbiter of what relief those class members should be awarded. Neither did it entitle the union to force TWA and the plaintiff class "against their will to continue a legal battle before the Supreme Court in a winner-take-all contest which neither par-

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[93] See note 29 *supra*.

[94] Union Brief, at p. 17.

[95] *Ibid.*

[96] *Id.* at 20.

[97] *Id.* at 43. The union, in any event, mischaracterizes the effect of the seniority order. As in *Franks* (424 U.S. at 765-766), the district court did not rewrite or supersede the collective bargaining agreement's seniority system, but merely ordered "a seniority remedy slotting the victim in that position in the seniority system that would have been [hers] had [she]" not been fired for becoming a mother.

ty desires to risk."[98] The union was, at most, entitled to a hearing on the remedy issue. This it received. Since the propriety of the seniority award entered after the hearing is no longer an issue in this case,[99] the judgments of the lower courts rejecting the union's objections are final and there is no further need to "judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement."[100]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals in No. 78-1545 should be reversed insofar as it rests on the misinterpretation of former Section 706(d) and the judgment in No. 80-951 should be affirmed. In the alternative, if the Court does not deem it appropriate to reach the issue in No. 78-1545, the judgment in No. 80-951 should be

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[98] Order of September 14, 1979, Pet. App. 80-951, at 15a, quoted in the opinion of the court of appeals in No. 80-951, *id.* at 8a.

[99] II J.A. 213. The statements in the union's Brief about the present situation at TWA, which are not supported by the record (*e.g.* union Brief, at pp. 7-10) are thus immaterial and we take no position on whether the union's statements are accurate.

[100] *Carson* v. *American Brands, Inc., supra,* _____ U.S. at _____ n.14, 101 S. Ct. at 998 n.14.

affirmed and the judgment in No. 78-1545 should be vacated with instructions to dismiss the appeal as moot in light of the settlement of the case.[101]

Respectfully submitted,

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AUGUST 1981.

[101] TWA's pending Petition for a Writ of Certiorari in No. 78-1549 (II J.A. 212) should be denied.

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Nos. 78-1545 and 80-951 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANNE B. ZIPES, et al.,

Petitioners,

vs. No. 78-1545

TRANS WORLD AIRLINES, INC.

Respondent.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

vs. No. 80-951

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR TRANS WORLD AIRLINES, INC., RESPONDENT IN NOS. 78-1545 AND 80-951

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IN THE

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OCTOBER TERM, 1981

ANNE B. ZIPES, et al.,

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INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

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Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR TRANS WORLD AIRLINES, INC., RESPONDENT IN NOS. 78-1545 AND 80-951

STATEMENT OF THE CASE

This class action litigation under Title VII of the Civil Rights Act of 1964,[1] begun in 1970 to invalidate an airline's practice of terminating flight attendants on pregnancy, is now a three-way contest.

[1] 42 U.S.C. 2000e *et seq.* Relevant sections as they existed during 1965-1970 are quoted in the appendix to this brief.

Respondent Trans World Airlines, Inc.,[2] defendant in the litigation, opposes the petitioners in Nos. 80-951 and 78-1545 on some issues and agrees with them on others.

In No. 80-951 the petitioner Independent Federation of Flight Attendants, the union of current TWA flight attendants, seeks to reverse two district court orders, one approving a settlement and the other granting retroactive seniority to employees to be reinstated under the settlement. The union objects that the settlement and grant of retroactive seniority are (1) contrary to the collective bargaining rights of the union's members and (2) invalid for lack of subject matter jurisdiction because the court of appeals in a prior appeal had held many plaintiff class members had not complied with a Title VII time limit.[3]

The class action plaintiffs as respondents in No. 80-951, who were TWA flight attendants terminated on pregnancy during 1965-69, support both the settlement approval and seniority orders although denying the alleged lack of jurisdiction. TWA, although agreeing with and not opposing the court of appeals ruling on lack of jurisdiction, supports both the settlement approval and seniority orders.

In No. 78-1545, the class action plaintiffs as petitioners seek to reverse the court of appeals' decision that their failure to comply with the Title VII time limit was not subject to waiver or estoppel. TWA as respondent in No. 78-1545 seeks affir-

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[2] As required by Rule 28.1 of this Court, Trans World Airlines, Inc. states that it is a subsidiary of Trans World Corporation, of which Hilton International Co., Canteen Corporation, Spartan-Newfoods Corp., and Century 21 Real Estate Corporation are also subsidiaries.

[3] These objections are stated in questions 1 and 2 in the Union's brief, p. (i), a reversal of the order of similar questions in its petition for certiorari. A Question 3 in the petition, which dealt with the district court finding (affirmed by the court of appeals) of the adverse impact of retroactive seniority on incumbent employees, was removed by this Court's order of May 18, 1981 as improvidently granted.

mance of the court of appeals holding. The union is not a party in No. 78-1545.

This brief does not deal with the issues in No. 78-1549, in which TWA as petitioner mainly seeks reversal of the district court summary judgment that TWA's pregnancy practice was unlawful sex discrimination under Title VII in 1965-1970. This Court granted TWA's certiorari petition on March 9, 1981 when it granted the petition in No. 78-1545, but its order of May 18, 1981 deferred consideration of No. 78-1549 and removed it from the argument calendar.

Amicus curiae briefs have been filed by the AFL-CIO, supporting the union's contention in No. 80-951, and by the United States and the Equal Employment Opportunity Commission, supporting the plaintiffs' contentions in Nos. 80-951 and 78-1545. The Equal Employment Advisory Council is filing an *amicus* brief in support of TWA.

The facts of the litigation, which are detailed in other briefs, are clarified by a chronology of the major events:

1970

Flight attendants' union filed separate, companion Title VII class actions against American Airlines and TWA attacking practice of terminating flight attendants on pregnancy (Aug.).

Pregnancy practice eliminated by both airlines (Oct.).

1971

Settlement agreements between both airlines and the plaintiff class members (represented by the one union), providing for return to work of terminated plaintiffs without back pay or retroactive seniority, were filed, and notice of hearing was directed for August 30 (July). I J. A. 19a-26a.

EEOC's motion to intervene to object to both settlements was denied (Aug. 11), and EEOC appealed. Court of appeals stayed hearing (Aug. 25).

1972

Court of appeals affirmed denial of EEOC intervention. *ALSSA* v. *American Airlines, Inc.*, 455 F. 2d 101 (Jan.).

Objections to settlements were filed (March).

Hearing was held on settlements resulting in orders of approval (March).

Objectors appealed in both cases (April).

1973

Settlements in both cases were set aside by court of appeals because of plaintiff union's conflicting interest in retroactive seniority. *ALSSA* v. *American Airlines, Inc.*, 490 F. 2d 636 (December).

1974

Certiorari petitions of both airlines were denied. 416 U. S. 993 (May).

1976

Summary judgments were entered against American (Apr.) and TWA (Oct.), each holding Title VII was violated by the pregnancy practice. Orders were entered holding Title VII time limit was complied with by plaintiffs in each case.

1977

Joint American-TWA brief on appeal was filed in Seventh Circuit (May).

Settlement between American and class plaintiffs was negotiated and approved in district court over objection of union of current employees (Aug.-Sept.).

1978

TWA's appeal from summary judgment and time limit orders and the union's appeal from American settlement approval were argued in court of appeals (Jan.).

Approval of American settlement was affirmed. *ALSSA* v. *American Airlines,* 573 F. 2d 960 (March), cert. den. 439 U. S. 876 (Oct.).

Court of appeals (Aug.) affirmed summary judgment of violation of Title VII by TWA, but many plaintiffs were held to have failed to comply with Title VII time limit. *In Re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F. 2d 1142. Pet. App. 80-951, p. 40a-58a.

1979

Court of appeals denied petitions for rehearing (Jan.).

Plaintiffs filed certiorari petition No. 78-1545, and TWA filed cross certiorari petition No. 78-1549 (Apr.) from decision in 582 F. 2d 1142.

On motion of parties, Supreme Court deferred ruling on certiorari petitions because of settlement negotiations (June 4).

Settlement agreement was entered into (June 18) between plaintiffs and TWA. Class members were reinstated as flight attendants. TWA agreed to pay $1,500,000 to Subclass A members (held to have complied with time limit) and $1,500,000 to much larger Subclass B (held not to have complied with time limit). Seniority of reinstated class members was provided to be determined by court in its discretion without contest or objection by TWA. Pet. App. 80-951, pp. 23a-39a.

Union granted leave to intervene (July 19).

Hearing on settlement (Oct.).

District court (Nov.) entered (1) an order approving settlement as fair, reasonable, and adequate, dismissing actions, and (2) an order awarding retroactive seniority to reinstated class members. *id.* p. 16a, 18a.

1980

On union appeal from both orders, court of appeals affirmed both (June). *id.* p. 1a. *ALSSA* v. *TWA,* 630 F. 2d. 1164.

Court of Appeals denied union petition for rehearing (Sept.). *id.* p. 11a.

Union's certiorari petition filed in No. 80-951 (Dec. 13) from decision in 630 F. 2d 1164.

1981

Certiorari granted on petitions in Nos. 78-1545 and 1549 and No. 80-951 (March 9).

Supreme Court order denied TWA's motion to limit review in No. 80-951 to order approving seniority, deferred consideration of No. 78-1549, limited review of No. 80-951 to Questions 1 and 2 in union petition, and dismissed Question 3 (May 18).

Alternative results from the grants of certiorari in Nos. 80-951, 78-1545, and 78-1549 are significant:

First. If in No. 80-951 the settlement approval and seniority orders are *affirmed,* the petitions in No. 78-1545 and No. 78-1549 would be treated as moot and this Court would direct dismissal of the action in accordance with settled practice. *Preiser* v. *Newkirk,* 422 U. S. 395, 403-4 (1975). This result would accord with the provisions of the order approving the settlement (Pet. App. 80-951, p. 17a). The litigation would be ended.

Second. If in No. 80-951 the settlement approval order is *affirmed* and the seniority order is *reversed,* the petitions in No. 78-1545 and No. 78-1549 would be treated as moot and dismissal would be ordered as in the first alternative. The decision on retroactive seniority would depend on whether the seniority order was reversed without remanding or was reversed for further consideration by the court of appeals or the district court.

Third. If in No. 80-951 the settlement approval order is *reversed,* the seniority order would probably require reversal

also, depending on the reasons for reversal of the settlement approval order. Then review in No. 78-1545 would be required.

Fourth. If in No. 78-1545 this Court *affirms* the court of appeals decision excluding from the plaintiff class those who had failed to comply with the Title VII time (i.e., Subclass B), the questions presented in No. 78-1549 (deferred for consideration by this Court's order of May 18, 1981) would remain for review as to those not excluded (i.e., Subclass A). The questions reviewed in No. 78-1549, with various alternative results, would be whether (a) it was illegal sex discrimination under Title VII during 1965-70 for TWA to terminate pregnant flight attendants without maternity leaves of absence and reinstatement after childbirth; (b) the plaintiffs were entitled to summary judgment on the issue; (c) the remedies should be prospective only; and (d) the Title VII time limit was complied with by formerly pregnant flight attendants working at ground positions or whose children were born during the relevant period.

Fifth. If in No. 78-1545 this Court *reverses* the court of appeals decision on exclusion of Subclass B members and disposes of (or remands for determination) the issues of waiver and estoppel raised by the petitioners, questions (a)-(d) in No. 78-1549 noted in the fourth alternative would be reviewed and the decisions would affect all members of Subclasses A and B held not barred by the Title VII time limit.

Details in petitioners' Statements of the Case require correction:

The plaintiffs (brief, pp. 4-9) repeatedly use the disparaging and inaccurate term "no mothers policy" in referring to TWA's practice of terminating flight attendants on pregnancy. This changes the plaintiffs' position from the allegations of the complaint, which used only the words "pregnancy" and "termination of employment" in attacking the TWA practice as

unlawful sex discrimination[4] (1 J.A. 6a). No allegation used the words "mother" or "motherhood". As the pleadings indicated, flight attendants terminated on pregnancy during 1965-1970 were denied work because of the disabilities of pregnancy, not because they were mothers.

Plaintiffs' brief contains serious factual misstatements relating to the merits of the question involved in Docket No. 78-1549. Although No. 78-1549 has been deferred, TWA corrects these misstatements lest they be repeated. First, plaintiffs' brief (p. 4) incorrectly states that before 1970 the responsibilities of its pursers "were substantially the same as those of female flight attendants." As TWA pointed out in its cross petition for certiorari in No. 78-1549 (pp. 9-10), there is no factual support in the record here for such a statement, and the issue was not litigated in this case. TWA's contrary assertion in other litigation—that the duties and responsibilities of both male and female pursers before and after 1970 were sufficiently greater than those of other flight attendants to justify a pay differential—is precisely the issue which was tried at length and is awaiting decision in the United States District Court for the Southern District of New York, *Maguire* v. *TWA*, 70 Civ. 3947. Second, plaintiffs' brief (p. 4, n. 10) quotes TWA's answer[5] to an interrogatory as if it were a description by TWA of its own employment practice. In fact, the interrogatory asked TWA to state the substance of the charge filed against it by plaintiff Maguire, and TWA's answer was only a statement of her charge and not its practice.

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[4] Paragraph 7, the only allegation on violating Title VII and the basis of the entire litigation, made termination of employment on pregnancy the sole unlawful practice (I J. A. 6a). Termination on pregnancy was the occurrence used in defining the class in court orders (I. J. A. 19a, 91a, 96a) and in the settlement agreement (Pet. App. 80-951, p. 24a).

[5] That answer is not in the Joint Appendix or any other appendix and is found in the record as Record No. 64; it answered an interrogatory (R. 57) asking TWA to state the substance of the charge Ms. Maguire filed with the EEOC.

TWA's pleading of plaintiffs' noncompliance with the Title VII time limit is incorrectly described twice in plaintiffs' brief. Plaintiffs' statement (p. 5) that TWA's answer "did not raise lack of timeliness as a defense" is half true because the answer did not allege noncompliance with the time limit as an "affirmative defense". But, as explained at pp. 44-5 of this brief, plaintiffs' allegations in the complaint of filing the EEOC charge on a certain date was denied in TWA's answer by pleading no knowledge of the plaintiffs' allegation. Plaintiffs are wrong for two reasons when they say that "TWA has never filed an amended answer despite having received leave to do so" (pp. 8, 35). TWA's motion to amend the answer set forth the text of the affirmative defense sought to be pleaded (I J.A. 99a). Further, TWA actually did file the amendment as a separate paper on November 25, 1974, Record No. 25 in District Court Docket No. 70-2071.

The fact that two District Court orders are before the Court in No. 80-951 is obscured by the union's brief (p. 3), which states that the "judgment under review in No. 80-951 is "an order of the District Court, . . . which approves a 'settlement agreement' ". Two separate orders were entered, one entitled "Order Approving Settlement and Dismissing Actions" (Pet. App. 80-951, 16a), and the other "Order Awarding Seniority" (*id.* p. 18a). The union's notice of appeal, which specifically named each order, has brought them both before the Court.

SUMMARY OF ARGUMENT

TWA urges the Court to affirm the settlement approval order regardless of its decision on the subsidiary seniority order. Then the litigation can be terminated by performance of the 1979 settlement contract, which has been postponed for two years by the union's appeal from the settlement order. The end of this 1970 litigation is highly desirable because it has been greatly protracted despite TWA's abandonment of the alleged Title VII violation in 1970 and its efforts to settle the claims of terminated employees in 1971.

I (No. 80-951)

A. The arguments of the union and the amicus AFL-CIO against the settlement approval order would, if sustained, prevent settlements of Title VII class actions under which retroactive seniority is to be decided by district courts. In requiring proof of plaintiffs' time limit compliance and defendant's violation of Title VII, their arguments would defeat the major settlement purpose of avoiding the delay and expense of the trial of complex and extensive issues.

It is common practice for settlement arrangements to leave disputed matters for court determination, such as a dispute with third persons over retroactive seniority. Decisions of courts of appeals sustaining the practice have included the companion American Airlines case. The broad equitable powers granted district courts by the Judicial Code and by Title VII include, by implication, the ancillary authority to approve settlements of class actions and determine retroactive seniority for employees reinstated under a settlement. The implication is supported by the public policy favoring the settlement of litigation, which is particularly strong in Title VII cases.

A contested decision of unlawful discrimination is not required for an award of retroactive seniority in connection with a settlement. The district judge, in considering a settlement, has before him materials on the defendant's alleged liability that

will permit him to make a sound judgment of the amount of retroactive seniority to be awarded. In this case these materials included the discovery record that produced a summary judgment of TWA's violation of Title VII, affirmed by the court of appeals.

Decisions of this Court answer the union's contentions that, without union consent, an award of retroactive seniority is forbidden by the collective bargaining agreement between TWA and the union, by § 703(h) of Title VII, by the Railway Labor Act, and by the due process clause of the Fifth Amendment.

B. The union's second major contention is that the district court lacked subject matter jurisdiction over the claims of Subclass B members who, under an earlier court of appeals decision, had not complied with the Title VII time limit that was held to be a jurisdictional prerequisite. A crucial answering fact is that the court of appeals decision on jurisdiction was pending on review in this Court at the time of the settlement. The strong judicial policy in favor of settlements outweighs the policies behind the strict rules of subject matter jurisdiction which the union asks the Court to apply.

II (No. 78-1545)*

A. Plaintiffs and the EEOC seek to overturn exclusion of the claims of the Subclass B plaintiffs on the ground that the court of appeals was wrong in stating that the relevant Title VII time limit was a jurisdictional requirement, precluding a finding of waiver or estoppel. The court of appeals was supported by similar statements of this Court and courts of appeals in the Seventh Circuit and elsewhere. Other courts of appeals decisions, cited by the plaintiffs and the EEOC, have rejected the jurisdictional idea with the statement that the time limit is like or analogized to a statute of limitations. But none have adopted the repeated statement of the EEOC's amicus brief that the time limit "is an ordinary statute of limitations." A third alternative, not as strict as a jurisdictional requirement nor as

* Point II will not be reached if the settlement approval order is affirmed in No. 80-951. See first and second alternatives, above p. 6.

loose as an "ordinary statute of limitations", is that the time limit is a prerequisite or condition precedent of the claim for relief under Title VII. Courts of appeals decisions have so referred to the Title VII requirement.

The provisions in § 706 of Title VII that a district court action must be preceded by an EEOC charge and, in some instances, a state proceeding differentiate the Title VII time limit from an "ordinary statute of limitations." The legislative history so indicates because, without these preliminary requirements, Title VII could not have been enacted. It is a reasonable inference from the statutory provisions, the legislative history, and procedural attributes that the time limit is more in the nature of a condition precedent or jurisdictional requirement than an "ordinary statute of limitations."

B. The plaintiffs' waiver and estoppel arguments are too weak to provide an appropriate occasion for this Court to decide the nature of the Title VII time limits. The arguments do not excuse the failure of the Subclass B plaintiffs to file EEOC charges within 90 days after their termination for the alleged unlawful discrimination. The arguments, based on the doubtful claim that the time limit is an ordinary statute of limitations, are that TWA (a) waived time limit noncompliance by not pleading it affirmatively and (b) intentionally failed to plead it in order to mislead the plaintiffs into appealing from the order approving the 1971 settlement in the belief that time limit noncompliance would not be raised if the settlement were disapproved. TWA's denial by answer of plaintiffs' allegations of the filing of the EEOC charge informed the plaintiffs that time limit compliance was a disputed issue. There was no waiver even if the time limit is an ordinary statute of limitations. The same fact destroys the plaintiffs' elaborate estoppel contention as do record proofs that the plaintiffs and their counsel were well aware of the disputed issue of time limit noncompliance before they appealed from the approval of the 1971 settlement.

ARGUMENT

TWA urges the Court to affirm the settlement approval order (Pet. App. 80-951, p. 16a) regardless of its decision on the subsidiary seniority order (*id.* p. 18a). This proceeding, which can then be terminated by performance of the settlement,[6] has developed into a stereotype of protracted litigation, burdensome to the courts[7] and litigants. TWA abandoned the alleged Title VII violation in October 1970, two months after the action was filed with a companion case against American Airlines, Inc. TWA's settlement in 1971 with the class of terminated employees was overturned on appeal on the issue of retroactive competitive seniority (490 F. 2d 636) and certiorari was denied. The settlement of the companion American Airlines case in 1977 was approved over the objection to retroactive seniority by its current employees' union. 573 F. 2d 960. The union lost the appeal and an attempted certiorari. But when TWA made a similar settlement in 1979 and a union's similar objection was unsuccessful in the lower courts, the union obtained the grant of certiorari now pending in No. 80-951. The end of the litigation remains obscure until this Court affirms the settlement approval order.

By objecting to the settlement itself and not merely to the grant of retroactive seniority, the union has held up for over two years the settlement approval required by Rule 23(e) of the

[6] The petitions in Nos. 78-1545 and 78-1549 would become moot and this Court would direct dismissal of the action. *Preiser* v. *Newkirk*, 422 U. S. 395, 403-4 (1975). Under the settlement agreement, this Court's order affirming the settlement approval order would "render such order no longer subject to review or modification" and would become the "Final Order Date" that would set the stage for performing the agreement (Pet. App. 80-951, pp. 27a, 35a-36a). See also the first alternative explained on p. 6.

[7] There have been four successively assigned district judges and five appeals to the Court of Appeals for the Seventh Circuit. See reference to opinions, *Brief for Plaintiff class*, pp. 1-2.

Federal Rules of Civil Procedure. However, the union members' interest against retroactive seniority for the plaintiffs could be adequately protected if this Court, in sustaining any union objection, applied it to the seniority order while affirming the settlement order.

I.

SETTLEMENT AND SENIORITY ORDERS SHOULD BE AFFIRMED (No. 80-951)

A. Validity of Determination of Retroactive Seniority for Reinstated Plaintiffs

Contrary considerations are overlooked by the union and the AFL-CIO when they contend the district court could not validly determine retroactive seniority for reinstated plaintiffs. The union and the AFL-CIO argue that such a determination requires a finding of the plaintiffs' right to recover under Title VII and is forbidden, without the union's consent, by the collective agreement between TWA and the union, § 703(h) of Title VII, the Railway Labor Act, and the due process clause of the Fifth Amendment. If sustained, any of these arguments would prevent the settlement of a Title VII class action that provided for judicial determination of retroactive seniority.

1. Court Determination of Seniority an Authorized Practice in Settlements

(a) Recent Precedents

It is common practice for settlement arrangements, by consent decree or otherwise, to leave disputed matters to be determined by the court. An outstanding example, close to the subject matter of the present litigation, is the consent decree entitled "Decree in Partial Resolution of Suit" in *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324, 330

n4 (1977). The decree provided that the district court would decide whether unlawful discrimination had occurred and also "whether any discriminatees should be awarded additional equitable relief such as retroactive seniority." The teamsters union was a defendant with the employer. This Court, after holding that the union's conduct in agreeing to and maintaining a seniority system did not violate Title VII, directed the union to remain in the litigation so that full relief might be awarded the victims of the employer's discrimination (p. 356 n43). A union not guilty of unlawful discrimination was thus recognized as a proper party in a judicial determination of retroactive seniority as a remedy for the employer's discrimination.

Court of appeals decisions, without any contrary holding we know of, have sustained the practice of district court determination of retroactive seniority over the objection of the current employees' union in connection with the settlement of a Title VII class action. In *EEOC* v. *American Tel. & Tel. Co.*, 556 F. 2d 167, 173-4 (3rd Cir. 1977), unions were permitted to intervene to modify a consent decree that was alleged to conflict with their collective agreements and to invade the competitive seniority rights of their members. The union's contention was rejected in language that applies directly to the contentions of the union and the AFL-CIO here:

> "To the extent that third party rights in which the unions are interested have been affected, they were allowed to intervene and be heard in this case . . . If this were a litigated judgment the fact that they and their members did not cause the discrimination would not prevent relief affecting third parties. See *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747, 778 . . . (1976). At best, in a fully litigated case, they would be entitled to be heard only on the appropriateness of the remedy. They have been heard on that aspect of the case. . . .

Judicial determination of seniority pursuant to a settlement, attacked as here in American Airlines' companion case, was

approved by the Seventh Circuit. *ALSSA* v. *American Airlines*, 573 F. 2d 960, 964 (7th Cir. 1978), *cert. den.* 439 U. S. 876. The opinion said at most the court was required to permit the union an opportunity to present to the court its members' interests in the proposed remedy and this was done. To the same effect were *Moore* v. *City of San Jose*, 615 F. 2d 1265, 1271-2 (9th Cir. 1980); *Meadows* v. *Ford Motor Co.*, ____ F. 2d ____, 25 EPD ¶31717 (6th Cir. 1981).*

(b) Basis of District Court's Authority in a Title VII Settlement

District courts have broad equitable powers in Title VII cases, including an award of retroactive seniority in a settlement remedy. § 1343(4) of the Judicial Code gives district courts original jurisdiction of any civil action "to secure equitable or other relief" under any federal statute "providing for the protection of civil rights." § 706(g) of Title VII, in describing the remedies in a contested action if the court finds the defendant engaged in "an unlawful employment practice", authorizes the court to "order such affirmative action as may be appropriate" including reinstatement, etc., or "any other equitable relief as the court deems appropriate." It is true that the authority exercised by the district court in a settlement is not expressly mentioned in Title VII. But consent decrees have been traditional procedural devices in courts of equity for generations. The authority over settlements is especially appropriate in Title VII actions. Compromises were expressly encouraged by Congress in Title VII. *Alexander* v. *Gardner-Denver*, 415 U. S. 36, 44, 50 (1974). As recently said in *Carson* v. *American Brands*, ____ U. S. ____, 67 L. Ed. 59, 67, quoting the *Alexander* opinion, "In enacting Title VII, Congress ex-

* Unlike these cases, a decision relied on by the union (pp. 24-5), *High* v. *Braniff Airways, Inc.*, 592 F. 2d 1330 (5th Cir. 1979), is entirely different from the present case. There a union was a signatory of a settlement agreement that was modified without the union's consent and without a court hearing on the union's objection. The case was remanded for further proceedings on the modification. The case would be relevant, and then only on the seniority order and not the settlement approval order, if TWA and the plaintiffs had provided for retroactive seniority and the court had not permitted the union to be heard in objection.

pressed a strong preference for encouraging voluntary settlement of employment discrimination claims."[8]

By analogy or direct relevance, a court of equity's authority to deal with retroactive seniority in a settlement is within the principle that a private right of action will sometimes be implied under a federal statute that provides other remedies, as explained in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975) and later cases.[9] The four-step analysis explained in the *Cort* opinion makes it even easier to imply such authority than to imply a private right of action under a statute not expressly providing for it. The authority meets the *Cort* test because Title VII is a statute creating a federal right; the legislature did not indicate an intent to deny such a remedy; the authority is not merely consistent with, but almost necessary to, the underlying purpose of the legislative scheme to imply it; and there is no tradition that would relegate the remedy in a federal action to state law. The award of such an affirmative remedy as retroactive seniority, held to be permitted by Title VII in contested litigation in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 763, 769 (1976), has accordingly been treated as an authorized practice in connection with a settlement, as by this Court in *Teamsters* and by courts of appeals in *American Airlines, AT&T,* and *Moore* noted above (pp. 14-16).

Thus, since the district court's authority to award retroactive seniority in a settlement is within the court's implied

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[8] To the same effect, in one of the earlier appeals in the present litigation, see *ALSSA* v. *American Airlines*, 455 F. 2d 101, 109 (7th Cir. 1972). Contrary to plaintiffs' footnotes 68 and 89 (brief, pp. 32, 40), Justice Powell's dissent in *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 401 (1977) cited this case and not "the Seventh Circuit's affirmance of the settlement and seniority award in the American Airlines case." That affirmance was not until 1978 in 573 F. 2d 960.

[9] *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 197; *Cannon* v. *Advisor University of Chicago*, 441 U. S. 677, 688 (1979); *Trans America Mortgage* v. *Lewis*, 444 U. S. 11, 23-24 (1979); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 575-576 (1979).

powers, it was not "conferred" by the settlement agreement nor by the requirement of court approval in Rule 23(e) of the Federal Rules of Civil Procedure, as the union argues may not be done (p. 44).[10] So settlement approval under the rule and an award of seniority in connection with it do not extend jurisdiction in violation of Rule 82, as the union contends (*id.*). Nor does Rule 23(e) violate the Rules Enabling Act by modifying the substantive rights of current employees who may be adversely affected by the award of retroactive seniority. The rule merely requires application of the "judicial process for enforcing rights and duties recognized by substantive law." *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 14 (1941).

2. Contested Decision of Unlawful Discrimination Not Required

Both the union (pp. 27-30) and the AFL-CIO (p. 10) argue in effect that the award of retroactive seniority was invalid because there was no *res judicata* of TWA's unlawful discrimination under Title VII. The argument is based on the provision in § 706(g) for various remedies following a conditional clause:

> "If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint."

As the union explains, this condition was quoted or paraphrased in opinions holding or stating that seniority relief was an appropriate remedy under § 706(g). *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 762 (1976). *United Airlines* v. *Evans*, 431 U. S. 553, 558-559 (1977). *Trans World Airlines,*

[10] A relevant analogy is the recent amendment of § 5 of the Clayton Act (Title 15, § 16, 1981 Pocket Part, U. S. C. Ann.) to provide a procedure for consent judgments submitted by the United States in antitrust cases. Congress did not consider it necessary to confer authority on district courts to enter consent judgments. The statute acknowledged that the courts have implied powers to enter such judgments.

Inc. v. *Hardison*, 432 U. S. 63, 79 n12 (1977). However, these cases do not hold that a final contested decision of unlawful discrimination is necessary when retroactive seniority is decided in connection with a settlement.

Both the union and the AFL-CIO fail to consider the fact that the district court here actually held that TWA's pregnancy practice during 1965-1970 was unlawful discrimination in violation of Title VII; and that this holding was affirmed by the court of appeals in *In Re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142 (1978). It is true that, at the time of the district court determination of retroactive seniority, TWA's certiorari petition in No. 78-1549 to reverse the finding was pending so that the finding of discrimination was subject to reversal.[11] Thus the union's position is that no effect should be given to a finding of unlawful discrimination if it is subject to review. The union's contention would prevent any settlement with retroactive seniority without an irreversible finding of unlawful discrimination, i.e., a decision by this Court.

Further, when a Title VII action is settled, a finding of violation is not a pre-condition of an award of seniority. Although lacking the evidence needed to determine a disputed issue of discrimination at a trial, a district judge who has considered the factors involved in approving a settlement will have the materials required for a sound judgment of the amount, if any, of retroactive seniority to be awarded reinstated employees. Approval of the settlement requires the district judge to "weigh the probabilities and possibilities of a victory or defeat as indicated by the legal or factual situation presented." *United Founders Life Ins. Co.* v. *Consumers Nat. Life Ins. Co.*, 447 F. 2d 647, 655 (7th Cir. 1971). The "most important

[11] Here the union is very inconsistent. The union's brief elsewhere (p. 38) emphasizes and relies heavily, as a ground for reversal, on the court of appeals holding that subject matter jurisdiction was lacking for the claims of the Subclass B members for their failure to comply with the Title VII time limit, for which the plaintiffs had filed a certiorari petition in No. 78-1545.

factor" for the district judge to consider is the "strength of the case for plaintiffs on the merits" balanced against the benefits of settlement to the defendant.[12] See *Grunin* v. *International House of Pancakes*, 513 F. 2d 114, 124 (8th Cir. 1975), *cert. den.* 423 U. S. 864; *Moore* v. *City of San Jose*, 615 F. 2d 1265, 1271 (1980), where the "probable outcome of the litigation" was a factor in considering the effect of a settlement on incumbents; *Manual for Complex Litigation*, § 1.46. In the present case, the district judge deciding the amount of retroactive seniority had relevant materials to consider in weighing the probability that TWA would have been held to have violated Title VII in terminating the plaintiffs.[13]

Thus a Title VII court of equity, without a contested decision on the defendant's violation of Title VII, has ample means to determine the reasonable amount of retroactive seniority to be awarded to employees reinstated under a settlement.

3. Union's Unsound Contentions of Miscellaneous Violations

a. The union contends that substantive and procedural *due process* rights of its members have been violated by the courts below despite the district court's permission for the union to intervene and present its objections to the award of retroactive seniority or any provision of the settlement agreement. The

[12] Cf. The probability of the plaintiffs' success on the merits has traditionally been estimated by federal courts of equity in ruling on motions for preliminary injunction. See 11 Wright and Miller, *Federal Practice and Procedure*, § 2948, pp. 449-55.

[13] The district court record included depositions, answers to interrogatories, produced documents, and memoranda that had accumulated in support and opposition to the plaintiffs' motion for a summary judgment of violation of Title VII, as shown by the district court docket, *i.e.*, TWA answers to interrogatories (11-27-74), Faris deposition (2-27-75), Cromartie and Preston depositions (4-16-75), Owen affidavit (7-9-75), TWA's answers to interrogatories (9-10-75), Bergs deposition (8-11-75), TWA's answers to fifth set of interrogatories (9-10-75), Solow deposition (12-5-75), Crombie deposition (6-30-76).

union (pp. 35-37) relies mainly on *Davidson* v. *New Orleans*, 96 U. S. 97 (1877), which itself refutes the union's contention. There a property owner attacked a city's assessments to pay for the costs of drainage. A state statute provided that the property owner could contest the assessment in court. The Supreme Court held that, since a court objection was provided for, "the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law." After noting that the property owner had been given notice and appeared at a fair hearing, the court commented:

> "If this be not due process of law, then the words can have no definite meaning as used in the Constitution."

The union here had the opportunity to appear and be heard.[14]

b. The *collective bargaining agreement* between TWA and the union is claimed (union br. p. 21) to be violated by the settlement agreement. The settlement agreement states that nothing contained in any other agreement, including labor agreements, shall be deemed to change or diminish the rights arising under the settlement (Pet. App. 80-951, 36a-37a). The collective bargaining agreement provides that seniority shall begin to accrue from the date of employment as a flight attendant and continue during the employment. II J. A. 91. The union's argument apparently is that the seniority order conflicts with this provision in stating that each reinstated employee "shall be credited with the amount of union (occupational) seniority to which she was entitled on the date on which her employment was terminated, plus credit for such seniority for the 'compensation period' as defined in the settlement agreement." Pet. App. 80-951, 19(a). The compensation period, as thus defined, began with the class members' termination and ended on the date of signing the settle-

[14] In *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 681 (1930), also cited by the union, due process was held to have been denied because the petitioner had been refused "an opportunity to present its case."

ment agreement on June 18, 1979. *id.* 24(a). It is arguable that the seniority order does not conflict with the collective agreement but *applies* it by providing for continuance of seniority for someone whose employment was unlawfully terminated. Or, if there is a conflict, since the allowance of seniority is valid under the reasoning of the *Franks* and *Teamsters* decisions as applied to the facts of this case, the seniority order prevails over any conflicting provisions of the collective agreement.

c. The union (pp. 31-2) makes a brief argument that *§ 703(h) of Title VII* prevents the award of retroactive seniority. The contention is that the seniority award treats the seniority system in the collective bargaining agreement as unlawful although under § 703(h) of Title VII it is not an unlawful employment practice to apply different standards of employment "pursuant to a bona fide seniority or merit system." The union cites statements about the effect of § 703(h) from the *Franks, Evans, Hardison* and *Teamsters* opinions cited above. The contention is inconsistent with the *Teamsters* holding. The Supreme Court, rejecting the Government's contention that the union violated Title VII because of the seniority system contained in the collective bargaining agreements, held § 703(h) granted immunity from a finding of illegality (431 U. S. 343, 355). Nevertheless, what the union does not point out, the Supreme Court held (pp. 363-71) two classes of plaintiffs entitled to retroactive seniority despite the union's lack of involvement in a violation and the existence of a "bona fide seniority system." So here the award of seniority is not contrary to § 703(h) even though the seniority system did not violate Title VII.

d. The union argues (pp. 32-5) that the award of retroactive seniority allows TWA to change the contractual seniority provisions of the collective bargaining agreement without complying with the procedures established under the *Railway Labor Act*, which applies to TWA under § 201 of the Act. 45 U. S. C. § 181. The union quotes § 2 of the act that a

carrier may not change rules or working conditions embodied in a collective agreement except as prescribed by the agreement or by statute. The argument is contrary to the holding in the *Teamsters* case (see above) that retroactive seniority could be awarded even though the seniority provisions of the collective agreement did not violate Title VII.[15]

(4) Court Determination of Retroactive Seniority Recognized as Proper Procedure in This Litigation

The factual background of this litigation, much of it not mentioned by the union or the AFL-CIO, supports the reasonableness of the district court's exercise of its authority to determine retroactive seniority.

The litigation over the rejected 1971 settlement indicated that retroactive seniority was a desirable and perhaps necessary provision in any later settlement agreement. While all terminated stewardesses were offered reinstatement by the 1971 agreement, it allowed them only the seniority they had on the date of termination (I J. A. 25a). The objectors to the settlement contended their seniority should be accrued to the date of reinstatement. The court of appeals noted that seniority has "a very important effect on stewardesses' trip assignments and the like" and that reinstated stewardesses under the settlement "would want seniority to accrue during the period they had been out of the job, but the greater seniority awarded to them, the larger the number of currently employed stewardesses who would be put to disadvantage." *ALSSA* v. *American*

[15] For its argument the union relies mainly on *Myers* v. *Gilman Paper Co.*, 544 F. 2d 837, 857 (5th Cir. 1977). However, as the union's brief overlooks, the cited decision was reconsidered on rehearing because of the later Supreme Court decisions in *Teamsters*, *Evans*, and *Hardison* cited above. See same title at 556 F. 2d 758, cert. dismissed under Rule 60. 434 U. S. 801. The opinion there said, "It is clear at least that the judgments of the district court and this court cannot stand on the theory this case has proceeded on to date." (p. 760).

Airlines, 490 F. 2d 636, 640 (1973) *cert. den.* 416 U. S. 993. The order approving the settlement was reversed because the union for current flight attendants, who also represented the terminated employees, was in a conflicting position because of the seniority issue.

When in 1977 American Airlines and its terminated flight attendants negotiated a settlement, the 1973 decision of the court of appeals made the parties realize the importance of providing retroactive seniority to the reinstated employees. As in the present TWA case, the American settlement provided that the court should decide the amount of retroactive seniority (see *ALSSA* v. *American Airlines*, 573 F. 2d 960 at 962); the district court granted the union's motion for leave to intervene; the union's only complaint at the hearing was the provision for full retroactive seniority (*id.*); the district court approved the settlement granting reinstated employees retroactive seniority from the time of termination; and the court of appeals affirmed. This Court denied certiorari in October 1978, 439 U. S. 876.

The success of the provision for district court determination of retroactive seniority in the *American* case over the union's objection, including the denial of certiorari in the Supreme Court, reemphasized the need for such a provision in June 1979 in the similar settlement negotiated in the companion TWA case, where each side was represented by the same attorneys as in the American case. After this Court deferred ruling on the certiorari petitions in No. 78-1545 and No. 78-1549 because of the settlement negotiations, the agreement was entered into in mid-June 1979 and the union was granted leave to intervene on July 19. The union was given full opportunity to present its objections in the district court (Hearing, II J. A. 26-83) and on appeal. It would be incongruous for the TWA settlement to be overturned because of its arrangement for court determination of retroactive seniority which had been encouraged in the decision overturning the 1971 settlement and expressly approved for the American settlement, in both cases with certiorari denied.

B. Subject Matter Jurisdiction Not Lacking for Settlement Approval and Allowance of Seniority

The union's second major contention is that the district court had no jurisdiction to approve the settlement or award seniority to the Subclass B plaintiffs (brief, Question 2, Point II). The argument is based on the court of appeals' holding in 582 F. 2d, which is before the Court in No. 78-1545, that the Subclass B plaintiffs had not complied with the relevant Title VII time limit that was held to be a jurisdictional prerequisite. The court of appeals opinion in 630 F. 2d, rejecting the union's contention (Pet. App. 80-951, pp. 5a-9a), stated first that a similar claim had been rejected in the related case of *ALSSA* v. *American Airlines*, 573 F. 2d 960, *cert. den.* 439 U. S. 876. The court noted that it was not material that the jurisdictional question had not been decided when the American settlement was approved, because in the TWA case the jurisdictional issue was pending on review in the Supreme Court, so that the uncertainty of the outcome was a factor leading to the settlement. The court of appeals concluded, "Where, as here, the jurisdictional question is not settled with finality, the parties should not be forced to litigate the issue of jurisdiction, if they can arrive at a settlement that is otherwise appropriate for district court approval" (*id.* p. 9a). These reasons and others fully support the court of appeals' holding.

The briefs of the plaintiff class members and of the EEOC as amicus argue the jurisdictional effect of the time limit as if they expect the Court to decide it in passing on the court of appeals decision on the settlement approval order. Plaintiffs' Brief, p. 38. EEOC Brief, p. 10. But both briefs also argue (plaintiffs, pp. 36-42, EEOC, p. 21) that the settlement order should be affirmed despite a holding that the time limit is jurisdictional. Thus both the plaintiffs and the EEOC concede that a decision on the jurisdictional nature of the time limit is unnecessary to an affirmance of the settlement approval and seniority orders. TWA advocates this position and urges the

Court to decide the issues in No. 80-951 without getting into the complex question of the nature of the Title VII time limit, which may also be avoided in No. 78-1545 (see pp. 48-49).

1. District Court's Authority Not Invalidated by Court of Appeals Reversible Holding on Time Limit Noncompliance.

As shown above (pp. 16-17), the district court's authority and jurisdiction to approve the settlement and award seniority are implied from the equitable jurisdiction over civil rights remedies in § 1343(4) of the Judicial Code and § 706(g) of Title VII. Recent examples of such authority are the *Teamsters, AT&T, American Airlines,* and *Moore* cases cited above.

In adjudicating the issues raised by a settlement, the district court considers the uncertainties of the litigation, the likelihood of the parties' victory or defeat, and the probable outcome of the litigation. In this case, at the time of the settlement it was uncertain whether the Subclass B plaintiffs would lose or win on the issue of time limit compliance because of the review pending in this Court. Lack of subject matter jurisdiction had not been completely adjudicated when the settlement was negotiated and approved and when seniority was granted to the reinstated plaintiffs under the district court's equitable powers. It may be that the plaintiff's noncompliance with the Title VII time limit would amount to laches in the equitable balancing of benefits under the settlement agreement and a seniority award. But the court of appeals' open holding on lack of jurisdiction did not deprive the district court of power to adjudicate under the rigid doctrine of subject matter jurisdiction invoked by the union.

The situation here is crucially different from that in *Insurance Group* v. *D & RGW Ry. Co.*, 329 U. S. 607, 612 (1947), which the union quotes for a statement that amounts to the doctrine of the law of the case, although the union does not use the phrase. It was a final ruling of this Court which the union's quotation refers to as the ruling "binding upon the district court

and the circuit court of appeals." In contrast, the court of appeals' decision here was under process of review in the Supreme Court at the time of the settlement.

Further, the law of the case doctrine is not applicable because the issue decided by the court of appeals was not the same as the issue before the district court. The union contends the law of the case to be the court of appeals' holding that the Subclass B plaintiffs had failed to comply with the jurisdictional prerequisite of compliance with the Title VII time limit. The jurisdictional question in the district court was whether it had authority to consider and approve a settlement and award seniority while the subject matter jurisdiction to prosecute the claims was uncertain during the review process pending in the Supreme Court.

The union's brief (pp. 48-50) contends that its jurisdictional argument is fully supported by *United Air Lines* v. *Evans*, 431 U. S. 553, 555-6 (1977). The union amplifies the possible ramifications of the statement in *Evans* that a "discriminatory act not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed" (p. 49). In *Evans* as in *McArthur* v. *Southern Airways*, 569 F. 2d 276, cited by the union and heavily relied on in the petition for certiorari as in conflict with the court of appeals decision here,[16] there was no uncertainty about the plaintiffs' non-compliance with the Title VII time limit.

The union also relies on *Zahn* v. *International Paper Co.*, 414 U. S. 291 (1973), and other cases for the holding that claims below the diversity jurisdictional amount may not be included in determining the class in a diversity class action. The issue is different in the settlement of a class action, as held in *Patterson* v. *Stovall*, 528 F. 2d 108, 112 n. 5 (7th Cir. 1976), which held a settlement including some class claims under $10,000 had jurisdictional support in other claims above the

[16] The *McArthur* case was overruled in the Fifth Circuit in *Coke* v. *General Adjustment Bureau*, 640 F. 2d 584, 592 (1981).

amount. Thus the principle of ancillary jurisdiction, urged by the dissent but rejected by the *Zahn* majority to determine class membership for prosecution of the litigation, was in effect held to permit the inclusion of non-jurisdictional claims in a settlement. Here that idea is applicable since the court of appeals held that Subclass A members had complied with the Title VII time limit (Pet. App. 80-951, pp. 54a-55a).

2. Judicial Policy Favoring Settlements Outweighs Union's Strict Jurisdictional Arguments

The union (pp. 39-41) cites many court decisions for the traditional results of lack of subject matter jurisdiction, as that it cannot be provided by stipulation, consent, waiver or conduct of the parties; that a challenge to the court's jurisdiction may be raised by anyone at any time; that a court is obliged *sua sponte* to inquire into its jurisdiction and dismiss the action if it lacks jurisdiction. However, in a contest between the two policies of settlement and jurisdiction as presented by the union's contentions, the settlement policy is the stronger and should prevail if settlements are to continue to be an effective means of terminating litigation.

Even if subject matter jurisdiction is considered an absolute essential that must be given full though formalistic effect, it will be fully satisfied here when the settlement approval order is affirmed. The court of appeals non-final decision of lack of jurisdiction will then become moot and of no effect under the terms of the settlement agreement itself (Pet. App. 80-951 25a, 35a) and under this Court's usual procedure when litigation is settled after certiorari has been filed or granted. The judgment of the court of appeals will then be vacated and the case remanded to the district court to dismiss the appeal as moot. *J. Aron & Co.* v. *Mississippi Shipping Co.*, 361 U. S. 115 (1959), *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950). Thus, as a result of this Court's approval of the settlement order, the court of appeals decision of lack of subject matter jurisdiction will not be an existing adjudication.

The union's jurisdictional contention means that a settlement is not valid and could not be carried out until the subject matter jurisdiction over all settled claims has been finally decided by the court of last resort. Such a result would be very impractical for courts of limited jurisdiction like the federal courts. The legal materials on settlements, with the process often extra-judicial, are relatively sparse in comparison with the large bulk of litigation that is disposed of by settlement.[17] But it is clear here that the practical settlement policy outweighs the rigid jurisdictional policy as the union would have it applied.

The jurisdictional policy is not as strong as the union contends. The courts long ago modified the strict rule that a judgment is absolutely void if the court lacked subject matter jurisdiction. For practical reasons, courts have sustained such a judgment in the interest of the finality of court decisions. *Stoll* v. *Gottlieb,* 305 U. S. 165 (1938); *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371 (1940). See *Restatement of the Law, Second, Judgments,* Tentative Draft No. 6 (1979) 149-153. It would be inconsistent with the purposes of Title VII and the strong judicial policy favoring settlements for the courts to hold that a disputed compliance with Title VII filing requirements cannot be settled because of their judisdictional nature. The dispute over compliance would prevent the settlement of extensive litigation that might take years to resolve otherwise. The judicial policy requiring subject-matter jurisdiction is intended to reduce the burden of litigation as is the judicial policy favoring the settlement of disputes. Here the two policies have the same objective and do not conflict. The settlement policy controls and refutes the union's contention that the settlement is invalid.

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[17] See Julius M. Title, Judge of Superior Court of Los Angeles, *The Lawyer's Role in Settlement Conferences,* 67 A.B.A. Jour. 592 (May, 1981): "The settling of cases before trial offers the greatest potential for assisting courts in reducing their ever-growing case loads."

II.

SUBCLASS B CLAIMS RIGHTLY EXCLUDED FOR NON-COMPLIANCE WITH TITLE VII TIME LIMIT*

(Docket No. 78-1545)

The plaintiffs and the EEOC seek a reversal in No. 78-1545 of the court of appeals' decision that the relevant Title VII time limit was a jurisdictional requirement, precluding a finding of waiver or estoppel and resulting in the exclusion of the claims of the Subclass B plaintiffs (Pet. App. 80-951, 55a-58a). Opinions of this Court have stated clearly that Title VII time limits are jurisdictional requirements:

> *McDonnell-Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973): "Respondent satisfied the *jurisdictional prerequisites* to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory Notice-of Right-to-Sue."
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> *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 47 (1974): Title VII "specifies with precision the *jurisdictional prerequisites* that an individual must satisfy before he is entitled to institute a lawsuit," referring to the filing of a "timely charge" with the EEOC and acting on the EEOC Notice of Right-to-Sue.
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> *Electrical Workers* v. *Robbins & Myers*, 429 U. S. 229, 239-40, 50 L. Ed 2d 427, 437 (1976); "In defining Title VII's *jurisdictional prerequisites* 'with precision' [citing *Alexander*], Congress did not leave to courts the decision as to which delays might or might not be 'slight' ".
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> *United Air Lines* v. *Evans*, 431 U. S. 553, 555, 52 L. Ed. 2d 571, 576-8 (1977): "Timely filing is a *prerequisite* to the maintenance of a Title VII action" [citing *Alexander* and *Electrical Workers*] Footnote 4. "The District Court . . . dismissed the complaint on the ground that it had no *jurisdiction of a time-based claim.* "Respondent cannot rely for *jurisdiction* on the single act of

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* Point II will not be reached if the settlement approval order is affirmed in No. 80-951. See first and second alternatives, above p. 6.

failing to assign her seniority credit for her prior service at the time she was rehired." Footnote 9.

Panels of courts of appeals in the Seventh Circuit, perhaps earlier and more consistently than in other circuits, have so stated and held. The many Seventh Circuit cases have included *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357, 359 (1968); *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811, 821 n26 (opinion by Judge Stevens, 1972); *Terry* v. *Bridgeport Brass Co.*, 519 F. 2d 806, 807 (1975); and *Davis* v. *Weidner*, 596 F. 2d 726, 728-9 (1979), in addition to the case under review in this Court's Docket No. 78-1545.

Courts of appeals in other circuits have often so stated and held, as in:

Wetzel v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 241 (3d Cir. 1975), *cert. denied*, 421 U. S. 1011 (1975): "the timely filing requirements with respect to EEOC appears to be a *jurisdictional prerequisite* to court action under Title VII."

Hamilton v. *General Motors Corp.*, 606 F. 2d 576, 579 (5th Cir. 1979), *cert. denied*, 447 U. S. 907 (1980): "A *jurisdictional prerequisite* to a Title VII action is the timely filing of a complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC complaint must be filed within 180 days of the alleged discriminatory act."

Brown v. *Mead Corp.*, ____ F. 2d ____, 25 EPD ¶ 31,730 (6th Cir. 1981): "Title VII filing requirements are *jurisdictional.*"

Local 179, United Textile Workers v. *Federal Paper Stock Co.*, 461 F. 2d 849, 851 (8th Cir. 1972): "A complaining party must satisfy two *jurisdictional prerequisites* in order to bring suit under Title VII: (a) a charge must be filed with the EEOC, (b) statutory notice from the EEOC of the right to sue must be received."

Olson v. *Rembrandt Printing Co.*, 511 F. 2d 1228, 1231 (8th Cir. 1975): After discussing the District Court's holding, the Court affirmed, "The filing of a charge with

the EEOC within the time limits of § 2000e-5(e) is a *jurisdictional prerequisite* to commencement of a court action."

Hinton v. *CPC International, Inc.*, 520 F. 2d 1312, 1315-6 (8th Cir. 1975): On the 90-day time limit for filing a District Court action, "Plaintiff's failure to initiate his action . . . within the *jurisdictional* 90-day period deprives the federal court of *subject matter jurisdiction.*"

Orahood v. *Board of Trustees, University of Arkansas*, ____ F. 2d ____, 25 EPD ¶ 31,715 (8th Cir. 1981): The opinion stated that because the EEOC charge was filed more than 180 days after the discriminatory act the district court "was without *jurisdiction* to afford the plaintiff relief."

Wong v. *Bon Marche*, 508 F. 2d 1249, 1250-1 (9th Cir. 1975): After stating that the 90-day period in which to commence a federal action could not be "forgiven or extended" the opinion stated, "the *requirement* for filing a complaint within the 90-day period was *jurisdictional.*"

Verzosa v. *Merrill Lynch, Pierce, Fenner & Smith*, 589 F. 2d 974, 976 (9th Cir. 1978): "A Title VII complainant must file charges with the EEOC within 180 days of the alleged act of discrimination; failure to do so deprives the district court of *jurisdiction.*"

District court opinions stating and applying the jurisdiction idea are too numerous to cite. A recent example is seen in *Mohasco Corp.* v. *Silver*, 447 U. S. 807 (1980), which, reversing a court of appeals decision, sustained a summary judgment of the Northern District of New York that the employee's failure to file a timely EEOC charge had deprived it of subject matter jurisdiction.

The plaintiffs and the EEOC urge adoption of the view stated in other opinions of courts of appeals and district courts (EEOC brief, pp. 10-18, n8 and n14) that the Title VII time limits are not jurisdictional. The EEOC repeatedly states (pp. 10, 11, 13, 18) that the time limit for filing the EEOC charge "*is an ordinary statute of limitations.*" This term has not been used in the opinions cited by the EEOC, although some have said

that the Title VII time limit is *like* a statute of limitations,[18] or that the requirement has been *analogized* to a statute of limitations,[19] or is the *administrative equivalent* of a statute of limitations.[20] The grounds or standard to be used in not applying the time limit have been described in these cases as waiver and estoppel,[21] equitable modification[22] or tolling.[23]

Much of the discussion of the nature of the Title VII time limit in court opinions, as in lawyers' briefs, has tended to be on the level of nomenclature. Prior opinions, including those of this Court, have been quoted for the use of the words "jurisdiction", or "statute of limitations," or even "limitations" as a significant indication of the nature of the time limit. Some opinions, while warning against giving weight to the words used, seem to make the conclusion depend on a count of labels in earlier opinions and in Congressional reports and debates. Justice Holmes, speaking of the time limit in the Federal Employees' Liability Act, warned against this practice: "we are not to be curious in nomenclature if Congress has made its will plain, . . ." *Atlantic Coastline R. Co.* v. *Burnette*, 239 U. S. 199, 201 (1915).

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[18] *Coke* v. *General Adjustment Bureau, Inc.*, 640 F. 2d 584, 591 (5th Cir. 1981), *Hart* v. *J. T. Baker Chemical Corp.*, 598 F. 2d 829, 832-3 (3rd Cir. 1979), *Oaxaca* v. *Roscoe*, 641 F. 2d 386, 391 (5th Cir. 1981)

[19] *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924, 927-8 (5th Cir. 1975), *Laffey* v. *Northwest Airlines, Inc.*, 567 F. 2d 429, 474 (D. C. Cir. 1976), *Reynolds* v. *Sheet Metal Workers*, ____ F. 2d ____, 25 EPD (CCH) ¶ 31,706 (D. C. Circ. 1981).

[20] *Cooper* v. *Bell*, 628 F. 2d 1208, 1212-1214 (9th Cir. 1980)

[21] *Reeb* (above, n. 19).

[22] *Hart, Cooper* (above, n. 18, 20)

[23] *Coke* (above, n. 18); *Malone* v. *North American Rockwell Corp.*, 457 F. 2d 779, 781 (9th Cir. 1972); *Leake* v. *University of Cincinnati*, 605 F. 2d 255, 259 (6th Cir. 1979); *Stebbins* v. *Nationwide Mutual Ins. Co.*, 469 F. 2d 268, 269 (4th Cir. 1972). Tolling has been allowed when the employee was unaware of the facts that would support a charge of discrimination. *Reeb* (above, n. 19); *Oaxaca* (above, n. 18).

A third alternative, not as strict as a jurisdictional requirement and not as loose as an "ordinary" statute of limitations, is that the time limit is a prerequisite or condition precedent of the Title VII claim for relief, the plaintiffs' cause of action. The briefs of the plaintiffs, the union, the EEOC, and the AFL-CIO do not discuss this third alternative. We set forth (Point II A) the reasons why this third alternative, compared with an "ordinary statute of limitations", is more compatible with the congressional plan of Title VII and more appropriate procedurally in balancing the opposing interests in Title VII litigation.

A. Time Limit a Prerequisite of Claim for Relief

To hold compliance with the time limit to be a prerequisite condition precedent to the claim for relief is consistent with the use of the term "prerequisite" by this Court and many other courts and as applied in court holdings. A very recent decision, *Coke* v. *General Adjustment Bureau, Inc.*, 640 F. 2d 584, 595 (5th Cir. March 1981), much relied on in the briefs of plaintiffs and the EEOC for its very comprehensive review of Title VII time limit decisions and its rejection of the idea that the time limit is jurisdictional, concluded that the time limit for filing EEOC charges "is a pre-condition to filing suit in district court, but is not related to the subject matter jurisdiction of the court." Other cases:

> *Forts* v. *Ward*, 621 F. 2d 1210, 1215 (2d Cir. 1980). "As a general rule, the filing of a timely charge with the Equal Employment Opportunity Commission (EEOC) is a *prerequisite* to the maintenance of a Title VII action in the District Court."
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> *Roberts* v. *North American Rockwell Corp.*, ____ F. 2d ____, 26 EPD ¶ 31,885 (6th Cir. 1981): "Timely filing of a charge with the EEOC and ... a complaint in federal district court is a *prerequisite* to maintenance of a Title VII action."
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> *Doski* v. *M. Goldseker Co.*, 539 F. 2d 1326, 1329 (4th Cir. 1976: "It is settled that before an aggrieved person

may file suit in the district court under Title VII he *must first have timely filed* a charge of discrimination with EEOC."

Jewett v. *International Telephone and Telegraph Corp.*, ____ F. 2d ____, 26 EPD ¶ 31,888 (3d Cir. 1981): "Timely filing is a *prerequisite* to the maintenance of a Title VII action."

Greene v. *Carter Carburetor Co.*, 532 F. 2d 125, 126 (8th Cir. 1976): "The timely filing of a charge of discrimination with the EEOC is a *prerequisite* to court action under Title VII."

Collins v. *United Air Lines, Inc.*, 514 F. 2d 594, 596 (9th Cir. 1975): After discussing the 90-day period established in § 706(d), "The satisfaction of this statutory requirement is a *necessary prerequisite* to commencement of a court action under the statute."

Inda v. *United Air Lines, Inc.*, 565 F. 2d 554, 559 (9th Cir. 1977) *cert. denied* 435 U. S. 1007 (1978): The opinion stated that a named plaintiff, suing on behalf of a class, "must have *secured a right* to sue by timely following the procedures set forth in Title VII."

1. Statutory Provisions

The new remedies granted in § 706 of Title VII to a person claiming employment discrimination in violation of § 703[24] indicate that the filing of a charge with the EEOC and other requirements are necessary before beginning an action in the district court. Paragraph (a) of § 706 directs the commission to notify the employer and investigate whenever a person claiming to be aggrieved charges that his employer has engaged in unlawful employment practices under § 703. The original act, as it existed when this action was begun in 1970, provided in paragraph (d) of § 706 that a charge under paragraph (a) "shall be filed within 90 days after the alleged unlawful employment practice occurred." § 706(d) provided different

[24] Relevant provisions of §§ 703 and 706 of Title VII are copied in the appendix to this brief, pp. 1a-6a.

unlawful employment practices under § 703. The original act, as it existed when this action was begun in 1970, provided in paragraph (d) of § 706 that a charge under paragraph (a) "shall be filed within 90 days after the alleged unlawful employment practice occurred." § 706(d) provided different time limits if a preliminary state proceeding was required by paragraph (b). Paragraph (e) then required the EEOC to attempt to conciliate the dispute and, if unable to obtain voluntary compliance, to notify the person aggrieved. Then, paragraph (e) provided, "a civil action may, within 30 days thereafter, be brought against the respondent named in the charge." Paragraph (f) referred to an action brought under the preceding paragraph (e) after compliance with the requirements for filing a charge under the preceding paragraphs (a) and (d).

The sequence of these provisions alone indicates that compliance with the requirements for state and EEOC proceedings are a part of the affirmative case of the aggrieved person to be performed, pleaded, and proved by him to establish the claim. Congress obviously imposed the unusually short time limits and the prior screenings of claims by the EEOC and state agencies in order to limit access to the federal courts to diligent claimants with meritorious claims that could not readily be disposed of otherwise. It is not reasonable to infer that Congress intended the time limits for these preliminary requirements to be "ordinary statutes of limitations", which are not shown by plaintiffs or the EEOC to contain anything resembling these prerequisites.

Plaintiffs (pp. 27-8) and the EEOC (p. 14) contend that the time limit in Title VII is an ordinary statute of limitations because it was patterned after the National Labor Relations Act in which the time limit for filing a charge has been so held. But there was no time limit in the NLRA when it was enacted in 1935. It was the Taft-Hartley Act in 1947 that first provided that the board should not issue a complaint on any unfair labor

practice occurring more than six months before filing the charge. See *NLRB* v. *Local 264,* 529 F. 2d 778, 782-3 (8th Cir. 1976). This was not a condition precedent since the original act provided for the remedy without the time limit. The NLRA does not contain any preliminary requirements like the state and EEOC proceedings without which Title VII could not have been enacted. See quotation (below, p. 38) from *Mohasco* opinion, 65 L. Ed. 2d at 545. The NLRA is not a good analogy.

2. Legislative History

The legislative history shows that the time limit for filing the charge with the EEOC and the other time limits in § 706 are not "ordinary statutes of limitations." The original bill that later became Title VII in 1964 provided a six-month period after an unlawful practice for filing the charge with the EEOC although a one-year provision had been included in otherwise identical language in a 1962 bill in the House (EEOC, *Legislative History of Title VII and XI of the Civil Rights Act of 1964,* pp. 2012, 2167). A later so-called 'leadership compromise' between Senators Dirksen and Mansfield, which took away the EEOC's power to file suit, reduced the time limit from six months to the final provision of 90 days for the employee's EEOC charge and 30 days for the district court action (*Id.* 3018).

This Court's recent decision in *Mohasco Corp.* v. *Silver,* 447 U. S. 807, 65 L. Ed. 2d 532 (1980), involving the Title VII time limit following a state proceeding required by the act, explains legislative history which refutes any inference that these time limits are only "ordinary statutes of limitations."[25] This Court

[25] The EEOC brief (p. 16, n4) says that the Court noted in *Mohasco* that the defendant had not asserted as a defense the plaintiff's failure to file his action within 90 days after receipt of the "right-to-sue" letter from the EEOC (opinion, 65 L. Ed 2d 539, n9). The EEOC adds, "and therefore [the Court] treated it as a waiver." The Court noted the action was filed on the 91st day but said nothing about waiver. There was no occasion to do so because the plaintiff was held to have been guilty of the more substantial late filing of his EEOC charge by 57 days.

there reversed the decision of the court of appeals for the Second Circuit (Judge Meskill dissenting), which had reversed the district court's summary judgment that the employee's failure to file the timely charge had deprived it of subject matter jurisdiction. The account of the legislative history and its effect is significant:

> "On February 10, 1964 the House of Representatives passed HR 7152, its version of the comprehensive Civil Rights Act. Title VII of that bill contained a six-month limitation provision for the filing of charges with the EEOC . . . In the Senate, HR 7152 met with exceptionally strong opposition. . . . During the course of one of the longest filibusters in the history of the Senate, the bipartisan leadership of the Senate carefully forged the compromise substitute (Dirksen compromise) that was ultimately to become in substantial part the Civil Rights Act of 1964. . . . (p. 544)
>
> "Section 706(d) of the compromise provided for a 90-day limitations period for filing discrimination claims with the EEOC . . . It was the first time the 90-day figure appeared in any proposed bill, and its appearance was unaccompanied by any explanation. . . .
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> "Since the Senate did not explain why it adopted a time limitation of only half that adopted by the House, one can only speculate. But it seems clear that the 90-day provision to some must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination. To others it must have represented a necessary sacrifice of the rights of some victims of discrimination in order that a civil rights bill could be enacted." (p. 545)
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> "By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination . . . We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the

balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction." (p. 548)

It is a reasonable inference that the provisions of § 706 for exhausting state remedies and for filing the charge with the EEOC to obtain EEOC conciliation were intended to be essential preconditions of the claimant's right to file the action in the district court. Congress did not know in 1964 how many actions were likely to be filed in the federal courts. The multitude of actions that have been filed, beginning gradually in the years after the enactment of the statute, was anticipated by the Congressional plan to give some protection to the courts by requiring the preliminary resort to state remedies and the filing with the EEOC. These preliminary requirements are more extensive and strict than anything in "ordinary" statutes of limitation, which provide only for the time of filing common law claims. The legislative history, indicating the unusual importance of the preliminary proceedings in Congress when the Civil Rights Act would not have been passed without them, supports a holding that the Title VII time limits are jurisdictional requirements if time limits ever have that effect. And certainly, if not jurisdictional, they are prerequisite conditions precedent.

The briefs of the plaintiffs and the EEOC, in arguing for easy modification of Title VII time limits, discuss only the negligent claimant's loss of a meritorious statutory right and do not consider this Court's many pronouncements that time limits for commencing litigation have the practical objective of protecting courts as well as defendants from the burden of stale claims. Time limits are "practical and pragmatic devices to spare the courts from litigation of stale claims" and the defendant "from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost."[26] As a result of these traditional objectives, the mere

[26] *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945). See also *Kavanagh* v. *Noble*, 332 U. S. 535, 539 (1947): Statutory time limits are imposed by the legislature "to cut off rights,

(*Footnote continued on following page.*)

enactment of the unusually brief time limits in Title VII is evidence of a strong congressional purpose to restrict Title VII remedies. The legislative history discussed above indicates such a purpose. The time limits, progressively more restrictive with changing versions of the legislation, emphasize that Congress intended to draw a firm line that would permit only the diligent claimant to recover.[27]

3. Procedural Differences

The procedural differences among time limits that are "ordinary statutes of limitations," condition precedents, or jurisdictional requirements are significant because the courts have weighed the procedural consequences in deciding the nature of a time limit.

If the time limit is an *ordinary statute of limitations*, the plaintiff is not required to plead compliance with it. The *defendant* must plead non-compliance under the specific requirement of Rule 8(c) of the Federal Rules of Civil Procedure.[28] A "statute of limitations" is one of many in a list of matters that a party "shall set forth affirmatively" in

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(Footnote continued from preceding page.)

justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary." In *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 428 (1965), the Court cited an English statute of the year 1540 for the statement, "the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights" Cf. *United States* v. *Marion*, 404 U. S. 307, 322 n. 14 (1971).

[27] The 1972 amendments to the 1964 Act extended the time limit for filing the EEOC charge from 90 to 180 days and for the court action after the EEOC notice from 30 to 90 days. But even the new limits, not applicable to the present cases, remain relatively short. The Congressional discussion of the 1972 amendments indicates a serious concern about the congestion of cases in the EEOC as well as in the federal courts. Legislative History of Equal Employment Opportunity Act of 1972, Senate Committee on Labor and Public Welfare (pp. 63, 1505-16, 1528-32).

[28] Relevant provisions of Rules 8, 9, and 12 are copied in the appendix to this brief, pp. 6a-8a.

pleading to a proceeding pleading. The burden is then on the defendant to prove the facts of non-compliance. Issues of fact are decided at the trial, if not avoidable by a motion for summary judgment. Under Rule 8(d), the allegations not denied under Rule 8(c) "are admitted when not denied by the responsive pleading." These procedural results of an ordinary limitations statute would be inconsistent with the provisions by Congress for the unusual prerequisites of the EEOC and state proceedings for a district court action.

If the time limit is *jurisdictional,* the *plaintiff* must plead and prove compliance with it. It need not be pleaded as a defense. Rule 12(b) includes "lack of jurisdiction over the subject matter" as the first item in a list of defenses that "may at the option of the pleader be made by motion" as well as by the answer. Under Rule 12(h) entitled "Waiver or Preservation of Certain Defenses," paragraph (3) states that the court shall dismiss the action "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter." This provision, as well as principles of subject matter jurisdiction applied by the courts, permit non-compliance with a jurisdictional time limit to be raised by any party or the court at any stage of the litigation, even at a hearing in the court of last resort. The harshness of this result has led some courts to decide that the Title VII time limits are not prerequisites of subject matter jurisdiction. See cases cited, EEOC brief, p. 10, n. 8.

If the time limit is a *condition precedent* to the plaintiff's claim for relief, compliance must be pleaded affirmatively by the *plaintiff* in order to state a claim upon which relief can be granted. A complaint failing to make the allegation is subject to a motion to dismiss under Rule 12(b) that a defendant's motion can make a defense of "failure to state a claim upon which relief can be granted." Such a defense is also included in the provision of Rule 12(h)(2) that it may be made "by motion for judgment on the pleadings, or at the trial on the

merits." The plaintiff's allegation of compliance can be made generally under Rule 9(c), entitled "Conditions Precedent." The rule provides, "it is sufficient to aver generally that all conditions precedent have been performed or have occurred." For the defendant's pleading, the rule states, "a denial of performance or occurrence shall be made specifically and with particularity."[29]

Illustrative of a condition precedent is *Glus* v. *Brooklyn Eastern Terminal,* 359 U. S. 231, 235 (1959), which disagreed with several earlier FELA cases and permitted non-compliance with the FELA time limit to be excused by estoppel because the defendant had induced the plaintiff's delay. But the plaintiff was required to plead and prove how he was misled by the defendant.

The plaintiffs and the EEOC argue that the time limit should be held not jurisdictional so that it can be modified under principles of waiver, estoppel, and equity. Because these principles "serve the ends of substantial justice," the EEOC argues, "they are presumed to be compatible with legislative intent, absent clear evidence to the contrary" (EEOC brief, p. 12 n9). Such an argument was recently rejected as short-sighted by this Court's statement that even if "the interests of justice might be served in this particular case" by a suggested construction of the Title VII time limit, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of even-handed administration of the law." *Mohasco,* 65 L Ed 2d at 548. Further, modification of Title VII time limits under vague principles of law urged by the plaintiffs and the EEOC

[29] *EEOC* v. *Wah Chang Albany Corp.,* 499 F. 2d 187, 190 (9th Cir. 1974), said of preliminary requirements of § 706(f)(1) and (3) under the 1972 amendments of Title VII. "the procedural steps that must be taken before suit may be prosecuted are most reasonably considered conditions precedent." The court held that performance of the conditions could be pleaded generally as permitted by Rule 9(c).

would involve the courts in extensive factual disputes over the varied excuses plaintiffs could contrive to explain their negligence.

B. Waiver and Estoppel Arguments Too Weak to Affect Decision.

The facts about waiver, estoppel, or equitable modification which plaintiffs and the EEOC contend should be the basis for deciding the nature of the Title VII time limit are not mentioned in their briefs. What has mainly created the plaintiffs' "Question Presented" in their petition and brief, and then the grant of certiorari, are the remarks in the court of appeals opinion that it need not reach questions of waiver and estoppel because it is precluded by "our conclusion that this filing requirement was jurisdictional." (Pet. App. 80-951, 55a, 57a). In the briefs the complex arguments about the nature of the time limit have obscured the simple background facts.

There is no doubt that the plaintiffs in Subclass B failed to comply with the requirement of § 706(d) that a written EEOC charge "shall be filed within ninety days after the alleged unlawful employment practice occurred." The one EEOC charge for all class plaintiffs was filed on June 1, 1970 (complaint, I J.A. 7a). 386 of the plaintiffs were terminated during 1965-70 before March 1, 1970, the beginning of the ninety-day period (compiled from I J.A. 111a-122a).* One of the attorneys for the union who filed the action, testifying at the March 1972 hearing on the 1971 settlement, said that 95 percent of those terminated from 1965 on "had never said boo", i.e., "They had never made any protest to the Union or, as far as I know, to anybody else about their discharges" (*Id. 47a and see also 48a-49a).*

* The cited exhibit sets forth the "last day worked" of those terminated for pregnancy, the annual figures being 30 (after 7-2-65), 76 ('66), 78 ('67), 112 ('68), 88 ('69), 2 (before 3-1-70). The time limit began at least on the last day worked under the *Electrical Workers* (429 U. S. 229) holding (the date the employee was "fired" and "stopped work" and under the holdings of this Court and even the reversed court of appeals in *Delaware State College* v. *Ricks*, ___ U. S. ___, 66 L. 3d 2d 431 (1981).

The failure of the Subclass B plaintiffs to comply with the time limit was an incurable defect in their claims when the action was filed. The plaintiffs' waiver and estoppel contentions have not tried to excuse the plaintiffs for their failure to comply. Instead, the plaintiffs' arguments have been, as described in the court of appeals' opinion, that TWA "waived this limitations defense by failing to plead it affirmatively in its answer" (Pet. App. 80-951, 55a); that its "statements at a March 17, 1972 settlement hearing constitute an express waiver of the filing requirement issue"; and that it should be estopped from raising the requirement because it "failed to raise it during the many lengthy proceedings which preceded the . . . motion to amend its answer to raise the issue" and so "played fast and loose with the courts" (*id.* 57a). The court of appeals, though indicating doubts about these contentions,[30] brushed them aside as not requiring consideration because of the jurisdictional nature of the time limit.

An analysis of the facts, as they clearly appear in the record, completely refutes these waiver and estoppel arguments.

1. The plaintiffs' major waiver contention has been that TWA's answer, filed September 30, 1970, waived the Subclass B plaintiffs' non-compliance with the time limit for filing EEOC charges by failing to allege it as an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure. It is true that the time limit was not included in paragraphs 12 and 13 of TWA's answer, which were labeled "First Affirmative Defense" and "Second Affirmative Defense." 1 J. A. 12a. But the plaintiffs' waiver contentions overlook, among other things, the fact that TWA clearly raised the time limit issue in the

[30] The opinion at the pages noted said it was questionable that a concession at a settlement hearing should be held a waiver when the settlement was later overturned and, describing decisions relied on by the plaintiffs, said they did not support the estoppel argument.

preceding paragraph 11 of its answer. Paragraph 11 of the answer alleged that TWA is

> "without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 [of the complaint] that on or about June 1, 1970, plaintiff union filed a charge with the EEOC alleging unfair employment practices, and that the EEOC notified plaintiff union on June 31, 1970 that it was entitled to initiate a civil action in a United States District Court." 1 J. A. 11a-12a.

This allegation under Rule 8(b) of the Federal Rules of Civil Procedure "has the effect of a denial." The answer in 1970 thus raised the issue of whether the plaintiffs had complied with the time limit for filing a charge with the EEOC.

The plaintiffs' allegations of the time of filing the charge and TWA's denial were appropriate pleading under such decisions as *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357, 359 (7th Cir. 1968), that compliance with the time limit was a "jurisdictional precondition to the commencement of a court action." That case was decided two years before the present action was filed. Similarly the plaintiffs' and TWA's pleadings were appropriate if the filing of the EEOC charge was a nonjurisdictional condition precedent.

However, plaintiffs' counsel later contended, on the appeal from the order approving the 1971 settlement, that non-compliance with the time limit had to be pleaded by the defendant as an affirmative defense under Rule 8(c). Appellant's Reply Brief, Court of Appeals, No. 72-1335 etc., page 28. After the court of appeals overturned the 1971 settlement and this Court denied certiorari, the case did not get back in the district court until May 1974, when it was assigned to a new judge. At the first status call of the case in September 1974, TWA moved, and was later permitted, to amend the answer by a "third affirmative defense" which pleaded non-compliance with time limit (1 J. A. 89a, 98a). This was done out of an abundance of caution in view of the contention of plaintiffs' counsel.

Thus the complex legal controversy over the nature of the Title VII time limit is in this case largely based on whether plaintiffs' non-compliance was properly pleaded by TWA's denial of plaintiffs' allegation of compliance instead of, as plaintiffs contend, by an affirmative statement of defense. If the time limit was not an "ordinary statute of limitations" when the answer was filed, it is not within the requirement of an affirmative defense in Rule 8(c). But, even if within Rule 8(c), when the defense appears on the face of the complaint, it need not be specifically pleaded in the answer. Cf. *Pierce* v. *County of Oakland*, ____ F. 2d ____, 26 EPD 21,149 (6th Cir. July, 1981). To hold otherwise, "would be reminiscent of the days of common law pleading" (*id.*). Here the answer denied plaintiffs' allegation of compliance. They and their counsel could not have been misled that TWA did not dispute their allegation.

2. The other weak waiver contention of the plaintiffs is that compliance with the time limit was waived by TWA's counsel at a March 1972 hearing on the approval of the 1971 settlement, later overturned on appeal. TWA's counsel, Joseph Carr, was discussing the terms of the settlement in concluding arguments. He explained that many of the plaintiffs had "slept for five or six years on their rights, without ever doing anything about them"; that it was questionable whether 90 percent of them had a right to go back to work; but that "we have agreed" (i.e., in the settlement) that all of them "may go back to work." The judge then asked, "In other words, you are waiving any question of statute of limitations?" Mr. Carr stated, "That is correct." (I J. A. 52A). Here TWA's counsel was merely stating what had been agreed to in the settlement. There was no intention to say, nor was the statement subject to any reasonable implication, that TWA was giving up its contention, apart from the settlement, that 90 percent of the plaintiffs had not complied with the time limit.

The plaintiffs' effort to make this explanation of the settlement a waiver of time limit compliance is contrary to Rule 408 of the Federal Rules of Evidence, which expressly states, "Evidence of conduct or statements made in compromise negotiations is . . . not admissable." Every lawyer knows that what he says in negotiating a settlement or in explaining it may not be used later as an admission. Any statement about the time limit was a "hypothetical or provisional concession conditioned upon the settlement's completion." Cf. *Hiram Ricker & Sons* v. *Students Intern. Soc.*, 501 F. 2d 550, 553 (1st Cir. 1974).

3. More complex, but equally lacking in substance, has been plaintiffs' contention that TWA concealed its intention to raise the time limit in an elaborate scheme to mislead the plaintiffs and the courts. They have argued that TWA intentionally failed to plead the Title VII time limit as an affirmative defense in its answer; that the plaintiffs were thereby misled to appeal from the 1971 settlement approval when they were unaware of the time limit or believed it had been waived; that then, when the proceeding was returned for trial after the settlement was overturned on appeal, TWA raised the time limit issue to assert lack of subject matter jurisdiction; and that TWA thereby mislead the plaintiffs and "played fast and loose with the courts." The record readily destroys this fantasy.

The record shows plaintiffs' present counsel, who were present and objecting to the 1971 settlement at the hearing in March 1972, knew full well, before the settlement was approved and before they appealed from the approval order, that the time limit would be raised to bar any recovery if the settlement was overturned. Their knowledge is shown, *first,* by the extensive discussion of non-compliance with the time limit as a reason for the settlement (I.J.A. 47a-53a). *Second,* on March 20, 1972, three days after entry of the order approving the settlement, there was an express warning that the time limit might prevent any recovery if the settlement order were re-

versed on appeal. This warning, contained in a report[31] by union counsel to all class members on the court's approval of the settlement, stated that a victory on the merits could be "illusory" because the claims might be defeated entirely by the time limit. The report concluded with a "hope" that there would be no appeal. Despite this express warning on March 20 that the appeal might destroy any recovery through the bar of the time limit, plaintiffs' present counsel filed the appeal on April 11 (District Court Docket No. 70-2071).

Further, plaintiffs' estoppel argument overlooks its only possible and limited effect. Even if defendant were estopped because it had misled the plaintiffs, inducing them to object to the settlement in the district court and to appeal from the approval order, they would recover only what the settlement would have given them if it had not been set aside. They would not have become class members who had complied with the time limit for claims under Title VII.

* * *

The foregoing discussion of plaintiffs' arguments of waiver and estoppel shows how they are readily refuted by record facts. The arguments seem to be too weak to provide an appropriate occasion for this Court to decide the nature of the Title VII time limit. But even if the time limit is held to be only an "ordinary statute of limitations", the arguments are too weak to change the court of appeals' exclusion of the claims of the Subclass B plaintiffs. Plaintiffs' stated basis of the argu-

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[31] I J. A. 57a. The report included the following paragraph:

"Time limits are contained in the Civil Rights Act requiring that a charge 'shall be filed within ninety days after the alleged unlawful employment practice occurred.' Since an estimated 90 percent of the members of the pregnancy class had been terminated long before ALSSA filed a charge in 1970 at the request of some members of the class who had then just been terminated, the claims of practically the entire class might be held to be untimely and barred in their entirety."

ments vanishes if the time limit is held to be more than a statute of limitations. For, as a jurisdictional or nonjurisdictional prerequisite, the time limit compliance had to be pleaded by the plaintiffs. TWA's not pleading it affirmatively did not waive noncompliance and was not an element of estoppel against TWA's contention of noncompliance even under plaintiffs' arguments.

CONCLUSION

TWA urges the Court to adopt the first or second alternatives described above (p. 6) and affirm the settlement approval order in No. 80-951. If the settlement approval order is reversed and the Court reaches No. 78-1545 as stated in the third alternative, TWA urges the Court to affirm the court of appeals time limit decision either because the time limit is jurisdictional or because, as condition precedent or an "ordinary statute of limitations", its application is not affected by the plaintiffs' waiver or estoppel arguments.

Respectfully submitted,

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APPENDIX

A. EXCERPTS FROM TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY, CIVIL RIGHTS ACT OF 1964.

Public Law 88-352, 78 Stat. 253, ff.; 42 U. S. C. § 2000e et seq.
(1972 Amendment Not Included)

Discrimination Because of Race, Color, Religion, Sex, or National Origin

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

* * *

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of

his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular [256] business or enterprise, . . .

Prevention of Unlawful Employment Practices

SEC. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice

or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and [260] twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or [260] local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be

filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggreived and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such [261] an action may be brought in any judicial district in

the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible [261] for the unlawful employment practice).* Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

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* The 1972 amendatory act added the phrase, "or any other equitable relief as the court deems appropriate." 42 U. S. C. A. § 2000-5, p. 357.

(h) The Provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U. S. C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e), the Commission may commence proceedings to compel compliance with such order.

* * *

B. EXCERPTS FROM FEDERAL RULES OF CIVIL PROCEDURE

Rule 8.

GENERAL RULES OF PLEADING

* * *

(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial.

* * *

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

* * *

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

Rule 9.

PLEADING SPECIAL MATTERS

* * *

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

Rule 12.

DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19.

* * *

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Rule 23.

CLASS ACTIONS

* * *

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

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No. 78-1545 and 80-951 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 78-1545

ANNE B. ZIPES, *et al.*, *Petitioners,*

v.

TRANS WORLD AIRLINES, INC., *Respondent,*

No. 80-951

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, *Petitioner,*

v.

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, *et al.*, *Respondents.*

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PLAINTIFF CLASS

As petitioners in No. 78-1545, the plaintiff class offers this response to the Brief of respondent TWA. In part I, we discuss TWA's criticisms of our statement of the case. In part II, we reply to TWA's arguments regarding the proper interpretation of former Section 706(d) and TWA's suggestion that the Court should decide whether TWA waived a timely-filing defense. As to the district court's retroactive seniority order in No. 80-951, TWA agrees with us that the court of appeals correctly affirmed that order and we therefore rest on the arguments presented in our opening Brief (at pp. 36-42).

I.

1. TWA explains that its statement quoted in our Brief at page 4, note 10, was intended to describe only the

allegations in another pending case, not the facts of that case or TWA's employment practice (TWA Brief, at p. 8). We consequently withdraw any suggestion that the quotation constitutes an admission by TWA.

2. Because the plaintiff class had no record of being served with an amended answer and because the court of appeals indicated that there was "no dispute" that the limitations defense had not been raised "in the pleadings" (Pet. App. No. 78-1545, at A15), our Brief (at pp. 8, 35) asserted that TWA had not filed an amended answer after the district court granted it leave to do so in 1974. TWA has directed our attention, however, to a portion of the record showing that it did file an amended answer raising a "statute of limitations" defense in November 1974, four years after the commencement of this suit (TWA Brief, p. 9).[1] Our contrary assertion, which was by no means essential to our position, thus appears incorrect and we respectfully ask the Court to disregard it.

3. TWA claims that our Brief (at p. 4) contains a serious factual misstatement because we wrote that the

[1] TWA's amended answer added verbatim the "Third Affirmative Defense" set forth in its motion for leave to amend, which is reprinted at 1 J.A. 89a. According to TWA's defense, the claims of the plaintiff class were "barred by the statute of limitations under Section 706(e) of Title VII" because charges were not filed with the EEOC "within 180 days after the alleged unlawful employment practices occurred" *(ibid.)*.

Thus, when TWA first raised this objection, TWA itself considered the timely-filing requirement to be a "statute of limitations." Not until December 1975 did TWA assert that failure to comply with the time limit deprived the court of subject matter jurisdiction (1 J.A. 102a-103a).

responsibilities of TWA's male pursers prior to 1970 were substantially the same as those of its female flight attendants (TWA Brief, at p. 8). TWA had argued below that the two positions were materially different, but the court of appeals held that "Male cabin attendants, designated 'pursers' by TWA, could remain on flight duty after becoming a parent. Although pursers served on international flights, their responsibilities were substantially the same as those of female flight cabin attendants" (Pet. App. 78-1545, at A2-A3). Our recital thus corresponds to the lower court's conclusion on a subject about which no issue is presented in the consolidated cases now before the Court.[2]

II.

1. We have argued, as have the United States and the EEOC as *amici curiae*, that the 90-day filing requirement of former Section 706(d) is in the nature of a statute of limitations, subject to equitable modification.[3] In so arguing we relied on the language of the statute, the

[2] TWA also complains about our using the phrase "no-mothers policy" to refer to TWA's pre-1970 practice (TWA Brief, at pp. 7-8). The phrase is descriptive, not pejorative, because it accurately denotes TWA's former policy. In using it, we have merely adopted the parlance of the district court and the court of appeals, which wrote of TWA's "no-motherhood policy" (I J.A. 134a; Pet. App. No. 78-1545, at A4). The phrase "no-pregnancy" policy, which TWA seems to suggest, is misleading because TWA also fired flight attendants who became mothers by adopting children. See the opinion of the court of appeals, Pet. App. No. 78-1545, at A2, A14 n.13.

[3] See our Brief, at pp. 24-34; Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae*, at pp. 10-21.

relevant legislative history, the purpose of the provision and the pertinent decisions of this Court.[4] Rather than respond directly to these arguments, TWA suggests what it deems to be a "third alternative" — namely, that the 90-day requirement is neither jurisdictional nor a statute of limitations, but is instead a "condition precedent" (TWA Brief, at pp. 12, 34).

We are far from certain whether TWA's argument is of any consequence in light of the current posture of this litigation. Our analysis is that if the district court, upon entering the retroactive seniority order and the order approving the settlement, properly refused to be persuaded that it lacked jurisdiction because of noncompliance with former Section 706(d)'s time limits, there would be no further question for decision by this Court (see our Brief, at p. 23). As we read TWA's submission, and particularly its reliance on *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231 (1959),[5] failure to comply with this supposed "condition precedent" in Title VII would not deprive a

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[4] We noted (Brief, at pp. 32 n. 68, 40 n. 89) that the dissenting opinion of Justice Powell, joined by the Chief Justice and Justice White, in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 401 (1977), cited an earlier court of appeals' opinion in this case. As TWA points out (TWA Brief, at p. 17 n. 8), this earlier opinion involved proposed settlements with both American Airlines and TWA, although only the former flight attendants of American Airlines were to receive any retroactive seniority beyond that which had accrued prior to their discharge. See *Airline Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines Inc.*, 455 F.2d 101 (7th Cir. 1972); I J.A. 67a. The court of appeals later set aside the district court's orders approving these settlements. See our Brief, at p. 7.

[5] See TWA Brief, at p. 42.

district court of power to hear the case. That indeed was the point of *Glus*.[6]

In any event, there is nothing in the legislative history to support TWA's contention that the 90-day limit should be considered as something other than a statute of limitations. We stressed, as did the Solicitor General, that Congress patterned this timely-filing requirement in Title VII after a comparable provision in the National Labor Relations Act (29 U.S.C. §160(b)), which has uniformly been considered a statute of limitations, not a jurisdictional requirement.[7] While TWA may believe that the "NLRA is not a good analogy" (TWA Brief, at p. 37), Congress thought the opposite and what matters here is Congress' intention.

Furthermore, even if one were to accept TWA's argument that filing a charge with the EEOC is an "essential precondition" or a "prerequisite condition precedent" (TWA Brief, at p. 39),[8] the question remains whether Congress intended *timely* filing with the EEOC to be a

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[6] TWA incorrectly states that the statutory time limit for filing cases under the Federal Employers' Liability Act, which the Court considered in *Glus*, is a "condition precedent" rather than a statute of limitations that must be asserted as an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure. TWA Brief, at p. 42. *Burnett* v. *New York Central Railroad Co.*, 380 U.S. 424 (1965), holds in no uncertain terms that the FELA time limit is to be treated as a statute of limitations subject to equitable modification. See also *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 557-560 (1974).

[7] See our Brief, at pp. 26-28; Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae*, at pp. 13-18.

[8] The plaintiff class, of course, satisfied this requirement.

jurisdictional imperative, as the court of appeals held.[9] On that score, the legislative record is clear that Congress did not so intend.

2. TWA further contends that if the Court disagrees with the court of appeals' interpretation of former Section 706(d), the Court should then decide whether TWA waived the timely-filing defense by failing to raise it in its answer (TWA Brief, at pp. 44-49). The court of appeals, however, did not decide this question (see Pet. App. No. 78-1545, at A15-A16). The district court also left the question open. While expressing considerable doubt that TWA could justify its four-year delay in pleading the limitations defense, the district court allowed TWA to amend its answer in 1974 and attempt "to prove through discovery techniques or otherwise that the plaintiffs suffered no prejudice or that the delay in amendment was excusable" (I J.A. 101a). Since the lower courts have not passed upon the question, this Court should not consider it. See, *e.g.*, *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397-398 (1971).

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[9] That TWA's "condition precedent" interpretation is merely an afterthought without any support is further demonstrated by the record. TWA now claims that its original answer placed in issue whether plaintiff class had complied with the time limits of former Section 706(d) because TWA's allegation of insufficient knowledge had the effect of a denial (TWA Brief, at pp. 44-45). But under Rule 9(c), Fed. Rules Civ. Pro., a denial that conditions precedent have occurred must be made "specifically and with particularity" or the defense is lost. See 5 Wright & Miller, *Federal Practice and Procedure* §1304 (1969). TWA's original answer did not satisfy that standard. Of course, when TWA did amend its answer four years later it pleaded the affirmative defense of statute of limitations, not failure to comply with a condition precedent. See note 1 *supra*.

Moreover, at this stage of the litigation any decision about whether TWA waived this defense would constitute a purely advisory opinion. If the Court holds that former Section 706(d) is not jurisdictional, such a ruling would eliminate the basis for the union's arguments against the seniority order[10] and there would be nothing left for decision since in this Court the union does not challenge the separate order approving the settlement.[11]

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[10] See our Brief, at p. 35.

[11] *Id.* at pp. 18-24, 36-38. We disagree with TWA that the Court should reach the issue concerning how former Section 706(d) should be interpreted *only* if the Court first determines that the seniority order cannot otherwise be sustained. TWA Brief, at pp. 25-26, 30 n. *. The issues before the Court in No. 78-1545 and No. 80-951 do not, in our view, necessarily dictate any particular sequence of decision. A result in favor of the plaintiff class, for example, could be based on the alternative grounds that the 90-day requirement is not jurisdictional and that in any event, the question was sufficiently in doubt so that the parties could settle the case, leaving to the district court's discretion after a hearing whether to order retroactive seniority in light of that court's outstanding findings of jurisdiction and violation. See our Brief, at pp. 35-38.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening Brief, the judgment of the court of appeals in No. 78-1545 should be reversed insofar as it rests on the misinterpretation of former Section 706(d) and the judgment in No. 80-951 should be affirmed. In the alternative, if the Court does not deem it appropriate to reach the issue in No. 78-1545, the judgment in No. 80-951 should be affirmed and the judgment in No. 78-1545 should be vacated with instructions to dismiss the appeal as moot in light of the settlement of the case.[12]

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October 1981

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[12] TWA's pending Petition for a Writ of Certiorari in No. 78-1549 (II J.A. 212) should be denied.

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Nos. 78-1545 and 80-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANNE B. ZIPES, *et al.*,
Petitioners,
v.
TRANS WORLD AIRLINES, INC.,
Respondent.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,
v.
TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT TRANS WORLD AIRLINES, INC.

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Counsel for all parties have consented to the filing of this brief. Accordingly, the Motion to Submit Brief as Amicus Curiae no longer need be acted upon.

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IN THE

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No. 78-1545

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Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") moves this Court for leave to file the accompanying brief as Amicus Curiae supporting the respondent, Trans World Airlines, Inc., in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* As a significant part of its activities, EEAC has participated as amicus curiae in many Title VII cases before this Court. In some instances, EEAC sought and was granted permission by this Court to file such briefs. *See, e.g., Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); and *Shell Oil Company v. Anne M. Dartt*, 434 U.S. 98 (1977). Otherwise, however, EEAC has filed such briefs with the consent of the parties. *See, e.g., Delta*

Air Lines, Inc. v. August, 101 S. Ct. 1146 (1981); *California Brewers Association v. Bryant*, 444 U.S. 598 (1980); and *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

3. The movant, EEAC, and its members, have broad experience and knowledge concerning the practical and legal application of the issues in this case. Those issues involve construing the timely charge filing requirements of Title VII and determining whether the parties may enter into a settlement which, in effect, supersedes their dispute over whether the plaintiffs' charges were filed in a timely manner. Because of its interest in Title VII timeliness and settlement issues, EEAC has participated as amicus curiae in other cases involving these subject areas. *See, e.g., Carson v. American Brands, Inc.*, 101 S. Ct. 993 (1981); *Delaware State College v. Ricks*, 101 S. Ct. 498 (1980); *Mohasco v. Silver*, 447 U.S. 807 (1980); and *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

4. The written consent of counsel for the respondent, Trans World Airlines, Inc., has been filed with the Clerk of the Court. Counsel for the petitioner Union has given consent conditioned upon a stipulation by the respondent employer that it will likewise consent to the filing of amicus briefs that may be submitted in support of petitioner's position. TWA's letter to that effect has been filed with the Clerk of the Court. Finally, counsel for the petitioners-respondents, Anne B. Zipes, *et al.*, has given consent to the filing of this brief on behalf of Subclass A only, thereby necessitating this Motion. A letter to that effect also has been filed with the Clerk of the Court.

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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September 11, 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 78-1545

ANNE B. ZIPES, *et al.*,
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---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT TRANS WORLD AIRLINES, INC.

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae in support of the position of the respondent, Trans

World Airlines, Inc., contingent upon the Court's granting of the accompanying motion, pursuant to Rule 42(3) of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

A discussion of EEAC's longstanding involvement in presenting to the Court the views of the employer community on significant equal employment opportunity issues is detailed in the accompanying motion. (*Supra*, pp. vii-x). We emphasize here, however, the importance of this case to the future litigative posture of employers nationwide in Title VII suits. It is not uncommon for EEAC members and other employers, like the employer in this case, to waive the right to litigate issues and to enter into settlement agreements in order to save themselves (and consequently, other parties) the time, expense, and inevitable risk of litigation. Of particular concern to EEAC, therefore, is the question of whether the Seventh Circuit's holding that the claims of some class members were untimely prevents the parties from resolving their continuing dispute over that issue by entering into a settlement that will end this lengthy litigation. EEAC believes that a challenge to the settlement on the basis of a disputed issue of timeliness not only is legally deficient, but, if successful, would have a debilitating effect on the settlement process as a fair, efficient and congressionally-preferred device for resolving employment discrimination claims.

STATEMENT OF THE CASE

In 1970, a Title VII class action was brought in this and another case by the airline hostesses' union challenging the employer's policy of terminating fe-

male flight attendants who became pregnant. I J.A. 4a.[1] The policy was subsequently eliminated and a settlement was reached which provided reemployment rights without back pay or retroactive seniority. I J.A. 21a. On a consolidated appeal by several objecting nonincumbent class members, the Seventh Circuit reversed court approval of the settlement and remanded the case to the district court with instructions to eject the union as class representative. *Air Line Stew. & S. Ass'n, Local 550 v. American Airlines*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

In subsequent proceedings, the Seventh Circuit found that the challenged policy violated Title VII. The court of appeals also ruled, however, that the claims of approximately 92% of the members of the plaintiffs' class were time-barred because these class members had failed to file charges with the EEOC within 90 days after the alleged unlawful practice occurred.[2] *In re Consolidated Pretrial Proceedings in*

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[1] References to Volume I of the Joint Appendix of the parties are cited as "I J.A.," followed by the appropriate page number.

[2] Prior to the 1972 amendments to Title VII, the limitations period was 90 days. The applicable pre-1972 provision reads in its entirety as follows:

> (d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty

the Airline Cases, 582 F.2d 1142 (7th Cir. 1978). Both the new class representatives and the employer filed petitions in this Court for a writ of certiorari (Sup. Ct. Nos. 78-1545 and 78-1549). Thereafter, this Court granted the parties' joint motion to defer consideration of the petitions pending the completion of settlement proceedings in the district court. 442 U.S. 916 (1979).

The employer again agreed to settle the case, this time with the new class representatives. Under the settlement, each of two subclasses was to receive 1.5 million dollars, and all class members were to be offered reemployment with full company seniority. Subclass A was composed of those whose claims were concededly timely; Subclass B was composed of those whose claims the Seventh Circuit previously had found to be time-barred. The district court was given the power to determine the amount of competitive seniority to grant to each class member.

The Seventh Circuit approved the settlement over the objections of the union, which had argued that the settlement of time-barred claims was outside the jurisdiction of the court and would adversely affect the contractual seniority rights of incumbent employees. 630 F.2d 1164. The court of appeals held that voluntary compliance with Title VII is of paramount importance, and the parties should be allowed to settle a suit rather than await the uncertain out-

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days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000(d) (1970).

come of Supreme Court review. *Id.* at 1168. It noted that there was a split in the lower court decisions over whether timely filing with EEOC is a jurisdictional prerequisite for maintenance of a Title VII suit. *Id.* at 1168 n.2 (cases cited therein).

SUMMARY OF ARGUMENT

The essence of the IFFA's argument is that once a court has determined that a Title VII charge is untimely under the statute's charge filing requirements, the court, *ipso facto*, loses jurisdiction over that portion of the case and cannot entertain a settlement by the party litigants. This argument confuses the statutory obligation of the charging party to file a timely charge with the jurisdiction of the federal courts to oversee the resolution of Title VII suits either by trial or settlement. The opinion of the court of appeals properly construed the strict filing requirement which the statute imposes upon parties to file charges within the statutory time period, while, at the same time, recognized that a holding of lack of diligence on the part of the plaintiff does not thereby prevent the court from approving a settlement of such claims in order to end the case and forestall further litigation on that issue.

Section 703(f)(3) of Title VII confers jurisdiction upon the federal courts to hear actions brought under the statute. A separate section—706(e)—imposes a strict requirement upon charging parties to file a charge under the statute within a specific time limit. The court of appeals' decision in No. 80-951 properly distinguishes between the viability of pursuing claims based on charges that should be considered untimely filed, and the dynamics of the settlement process

which is an inherent part of court jurisdiction. A settlement, similar to a consent decree, "normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971).

As the party briefs before the Court demonstrate, the exclusion of the claims of part of the class membership remains in dispute, but the parties' assessment of this and other issues has led them to settle rather than to litigate. 630 F.2d at 1168. This circumstance should not be viewed as unusual. Challenges to the timeliness of the charge are raised often, and many times early in the proceedings. Court resolutions of such preliminary questions are not subject to interlocutory appeal (*Gardner v. Westinghouse Broadcasting Company*, 437 U.S. 478 (1978)) and they, among other issues, will play a large part in party decisions as to whether to settle or to continue to litigate the case. Approval of the settlement irrespective of the timeliness question, therefore, would simply be consistent with this Court's observation that when courts review settlements, "[t]hey do not decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.*, 101 S. Ct. 993, 998-99 n.14 (1981).

The IFFA, however, would prevent the settlement of timeliness issues and force the parties to litigate such issues to some final forum, which, as this case demonstrates, could involve several runs up and down the appellate ladder. In view of Title VII's strong preference for voluntary compliance, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), parties

to an employment discrimination suit should have broad discretion to settle a case, unencumbered by the need to resolve legal issues otherwise rendered moot.

If the Court deems appropriate the review of No. 78-1545, we submit that the court of appeals' decision excluding the prosecution of Subclass B claims should be affirmed. As a general matter, although this Court has used different labels to describe Title VII's charge filing requirements, it has consistently required they be complied with strictly. In defining Title VII's jurisdictional prerequisites "with precision," *Alexander v. Gardner-Denver Co.*, 415 U.S. at 47, this Court has observed that "Congress did not leave to courts the decision as to which delays might or might not be 'slight'." *Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229, 240 (1976). On the basis of these and other decisions of this Court, see *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 n.4 (1977), as well as upon its own examination of relevant legislative history, the court of appeals properly rejected arguments for equitable tolling made on behalf of Subclass B members, all of whom failed to file timely charges. In sum, the court correctly determined in No. 78-1545 that neither waiver nor estoppel theories would preserve the prosecution of such claims against the interjection of an untimeliness defense.

ARGUMENT

ALTHOUGH THE CLAIMS OF SUBCLASS B MEMBERS WERE UNTIMELY FILED, THE COURT OF APPEALS PROPERLY RULED THAT THE DISTRICT COURT HAD JURISDICTION TO APPROVE THE CLASS-WIDE SETTLEMENT

A. Approval of the Class-Wide Settlement is Appropriate Irrespective of the Merits of the Timeliness Issue

1. *Policy Considerations Favor Settlement*

Despite its complicated procedural history, the basic facts of this case are unextraordinary. EEOC charges were filed; a right to sue letter was issued by EEOC; a private Title VII suit was filed; the employer-defendant challenged the timeliness of the EEOC charge; the employer's position was adopted; the parties recognized that further appeal and litigation was possible, but determined, on balance, to settle the case. The settlement, however, is challenged on the basis that charges found to be untimely can never be settled because the court automatically loses jurisdiction over the suit.

There is nothing illegal or inconsistent, however, in requiring strict adherence to the statutory charge filing requirements and at the same time permitting the courts to approve settlements which, in part, terminate hotly disputed timeliness issues. The Seventh Circuit's judgment, in this regard, promotes Title VII's policy in favor of settlement and is consistent with the principle that when courts review settlements, "[t]hey do not decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.*, 101 S. Ct. 993, 998-99 n.14 (1981).

The premium placed upon conciliation and settlement by the court of appeals' decision is consonant with Title VII's framework and is well-supported by the decisions of this Court. The "centerpiece" of Title VII is the prompt resolution of discrimination charges through conciliation. *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 359-60 (1977).[3]

As this Court has recognized, Title VII was framed to "screen from the federal courts those problems of civil rights that could be settled to the satisfaction of the grievant in 'a voluntary and localized manner.'" *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979), *citing* 110 Cong. Rec. 12725 (June 4, 1967) (remarks of Sen. Humphrey).[4] Approval of this set-

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[3] In *EEOC v. Sherwood Medical Industries*, 452 F. Supp. 678, 683 (M.D. Fla. 1978), the court noted "the mandate that conciliation be attempted is unique to Title VII and it clearly reflects a strong congressional desire for out-of-court settlement of Title VII violations."

[4] The policy of the law to favor and uphold the amicable settlement of disputes has been applied by this Court in a variety of contexts. As the Court stated in *May v. LeClaire*, 78 U.S. (11 Wall.) 217, 228 (1870), when an agreement involving the settlement of unadjusted demands on both sides is made in the spirit of compromise, it should be upheld by courts of equity, and the rights of both parties under it should be protected as far as the facts and the settled principles of jurisprudence will permit. *Accord, Williams v. First National Bank*, 216 U.S. 582, 595 (1910). To be sure, such principles would not sanction a court-approved settlement accomplished by fraud, *Tilton v. Cofield*, 93 U.S. 163 (1876). In the absence of such an egregious factor, however, a "settlement ought not to be overthrown, *even if the court should now be of the opinion that the party complainant of it surrendered*

tlement obviously promotes Congress' decision that cooperation and voluntary compliance with the civil rights laws are "*the preferred* means for achieving [the elimination of unlawful employment discrimination]. . . ." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (emphasis in the original).[5]

Among the reasons for encouraging settlement are the need to alleviate crowded dockets, the costs of litigation, and the long wait for judicial determinations. *McArthur v. Southern Airways, Inc.*, 569 F.2d 276, 280 (5th Cir. 1978). In this eleven-year-old class action proceeding with industry-wide implications, these factors are particularly pertinent, and lend additional weight to the presumptive validity with which the settlement should be viewed. Thus,

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rights that the law, if appealed to, would have sustained." *Hennessy v. Bacon*, 137 U.S. 78, 85 (1890) (Harlan, J.) (emphasis added). *See also United States v. Swift & Co.*, 386 U.S. 106, 119 (1932).

[5] Beyond the clear, general policy in favor of encouraging settlements, *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960), the circuit courts have consistently identified civil rights cases as involving "an area where voluntary compliance by the parties over an extended period will contribute significantly toward ultimate achievement of statutory goals." *Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic.*, 514 F.2d 767, 771 (2d Cir. 1975), *cert. denied sub nom. Larkin v. Patterson*, 427 U.S. 911 (1976); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968) ("there is great emphasis in Title VII on private settlement and the elimination of unfair practices *without* litigation") (emphasis added); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976) ("it is the clearly expressed intent of that Act to encourage settlements").

in a case with procedural parallels to the case at bar, the Fifth Circuit considered the scope of the government's authority to encourage and negotiate the settlement of industry-wide employment discrimination charges in the nation's steel industry. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). In the face of challenges to a consent decree by intervenors, the court of appeals underscored the importance of the settlement as vitiating the need for industry-wide litigation. "[T]hrough what lens," asked the court, "do we judge the adequacy of the settlement as against the intervenors' objections, bearing in mind that Congress and the Supreme Court have expressed a preference for voluntary compliance above all other tools of enforcement?" *Id.* at 849. Summarizing the extensive case law favoring settlement over negotiation, the court concluded that the agreement was entitled to enforcement unless the district court abused its discretion or overlooked an illegal provision. *Id.* at 850. Indeed, the court of appeals even acknowledged that although the consent decree contained no judicial findings of unlawful employment discrimination, it also was governed by rules of law "substantially less rigorous than those which govern contested litigation." *Id.* at 881.[6]

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[6] *See also Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (Title VII, class action):

> "It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense."

Liberal principles toward settlement approval were applied again in *EEOC v. Safeway Stores*, 611 F.2d 795 (10th Cir. 1979). In evaluating the district court's administration of a Title VII consent decree, the Tenth Circuit emphasized the flexibility and broad discretion the district court properly enjoys. In approving the decree, the court of appeals cautioned that "to argue that the terms of a consent decree may not vary from the statutory limits of Title VII is to misconceive the nature of consent decrees and to ignore the strong policy embodied in Title VII in favor of voluntary settlements." *Id.* at 789.

In view of these strong policy considerations favoring settlement, the court of appeals properly deemed irrelevant its previous decision declaring part of the class untimely. Inherent in its decision was the practical realization that the dispute over the timeliness of certain class members raises merely one among a host of legal issues often contested early in a proceeding. Were the issue always to be forced to definitive resolution, countless settlements would be aborted. More fundamentally, no incentive would remain for a defendant ever to settle a claim prior to a final judgment on the merits, for there always would be the risk of the case "rising from the dead" simply because the issue of timeliness had once been raised. *Cf. Burkhalter v. Montgomery Ward & Co.*, 26 FEP Cases 524, 526-27 (E.D. Ark. 1981) (where parties entered into settlement, all issues were thereby mooted). *See also West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085-86 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) ("A Consent Decree would be worthless if it could be attacked on the ground that

had the Court made a particular determination such relief would then not be statutorily available").

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974), this Court acknowledged that the federal courts enjoy "plenary power to secure compliance with Title VII." Empowered by the statute to grant all forms of equitable relief deemed appropriate, this Court noted in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778 n.39, 789-80 (1976), that [e]quitable remedies are a special blend of what is necessary, what is fair, and what is workable. . . . In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests. . . ." In view of a settlement between the parties that has undergone an evaluation by the district court to insure fairness, the judgment of the court of appeals approving its enforcement should not be disturbed.

2. *Article III Presents No Bar to Settlement*

Principles of justiciability inherent in Article III of the Constitution obviously apply to all federal cases, including this one. Accordingly, the court-approved settlement here under review presupposes the existence of federal jurisdiction over the subject matter of the case. Particularly in view of the policies favoring settlement over litigation, however, the judicial inquiry into subject matter jurisdiction sufficient to support court approval and enforcement of a settlement is directed primarily toward whether there exists the power to hear the type of case involved. *Cf. Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). As this case plainly involves a federal statute which

vests jurisdiction in the federal courts, 42 U.S.C. § 2000e-5(f)(3)(1976), irrespective of the timely filing obligations placed upon charging parties by another section, approval of this settlement violates no rule of Article III justiciability.[7]

In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 754 (1976), this Court observed that the meaning and scope of all concepts of justiciability "must be derived from the fundamental policies in forming the 'cases and controversies' limitations imposed by Article III." How these policies impact upon the requirement that a federal court have undisputed subject-matter jurisdiction over a case necessitates an inquiry into the purpose of the jurisdictional requirement. This case, of course, concerns exclusively federal court administration of a federal statute. Absent limitations on jurisdiction imposed by the Constitution for reasons of federalism, such as state rights or separation of powers,[8] this Court has re-

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[7] *See Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen v. Larsen*, 345 U.S. 571 (1953) (Jones Act cases); *Montana-Dakota Util. Co. v. Northwestern Pub. S. Co.*, 341 U.S. 246 (1951) (Federal Power Act); *Securities and Exchange Comm. v. Thermodynamics, Inc.*, 319 F. Supp. 1380 (D. Colo. 1970) (Securities Act).

[8] It is precisely these limitations that apply to a case like *Fairfax Countywide Citizens v. Fairfax County*, 571 F.2d 1299 (4th Cir.), *cert. denied*, 439 U.S. 1047 (1978), and thus make that case irrelevant here. There the court of appeals concluded that the district court lacked jurisdiction to approve a settlement agreement which was nothing more than a private contract whose validity and interpretation were governed by state law. The court searched in vain for either diversity jurisdiction under 28 U.S.C. § 1332 or a "special statutory grant of jurisdiction empowering the district court

peatedly turned away challenges on jurisdictional grounds in favor of promoting other significant policies. *See, e.g., Ladner v. United States*, 358 U.S. 169 (1958) (availability of collateral attack on federal conviction not to be considered *sua sponte*); *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 129 n.1 (1953) (since standing not questioned Court will not rule on it); *Louisiana Power & Light v. Thibodaux*, 360 U.S. 25, 26 n.1 (1959) (question of appellate jurisdiction eliminated by a limited grant of certiorari). Accordingly, as federal jurisdiction clearly is present in this case, there is no reason to hold that the courts have no authority to permit the parties to enter into an enforceable settlement.

Moreover, there is a separate but relevant reason for approving the particular settlement in this case. Because at least some of the class members were timely, this case plainly is one that "belongs" in federal court. Not all class members must meet formal jurisdictional requirements in order to participate in a settlement. *See Patterson v. Stovall*, 529 F.2d 108 (7th Cir. 1976). In *Patterson*, the court of appeals

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in the instant case to take cognizance over the contract dispute." 571 F.2d at 1303 n.10.

Similarly, in *United States v. Boe*, 543 F.2d 151 (C.C.P.A. 1976), the court negated a voluntary settlement on an agreed statement of facts because court approval would have usurped the power of the Customs Service, an executive department. The court made clear that the attempt to exercise a patently non-existent jurisdiction would tend to chip away at the separation of powers. *Id.* at 158. No such issues arise in the instant case which unquestionably involves only issues within the undisputed jurisdiction of the federal courts.

reviewed a proposed class action settlement involving a suit by depositors to recover sums invested by defendants in cash commodities for deferred deliveries. Among the objections of certain depositors to the proposed settlement was that the trial court lacked jurisdiction. The court rejected the argument on numerous grounds, the most important of which for purposes here concerned the existence of diversity jurisdiction. The court observed that "although class members cannot aggregate their claims in a diversity case," *Snyder v. Harris*, 394 U.S. 332 (1969); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), "*at least some of the claimants could have individually satisfied the $10,000 limitation.*" *Id.* at 112, n.5 (emphasis added). Thus, the court acknowledged that, like the case here, settlement of class claims is permissible so long as there exists uncontestable jurisdiction over at least some of the class members.[9]

In sum, where a cause of action is asserted under federal law, as in this case, a federal court has the power to try or to settle the case. In this limited sense, if the plaintiff "makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.). *Cf. Pittsburgh C. & St. L. Ry. v. Ramsey*, 89 U.S. (22 Wall.) 322 (1875) (parties

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[9] It was the total absence of timely plaintiffs in *McArthur v. Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978), that distinguishes that case from the one here at bar. As the Fifth Circuit stated, "[s]ince *no plaintiff* in this cause made a timely filing with the Equal Employment Opportunity Commission (EEOC), the district court should have dismissed this cause for lack of jurisdiction." *Id.* at 277.

can admit jurisdictional facts). Before ultimate determination of the validity of the federal claim—a determination that would include resolving the dispute over whether certain plaintiffs made timely filing—there is no statutory or constitutional barrier that prevents the parties from settling their dispute.

3. *Retroactive Seniority Provisions Are Not a Bar to Settlement*

The settlement here under review has been challenged on the ground that the district court lacked the power to approve a grant of retroactive seniority without Union acceptance. Even assuming that the issue is properly before the Court,[10] this argument is without merit. Because this settlement "serves the public policy of remedying past acts of sex discrimination," 630 F.2d at 1169, and has been evaluated by the court and found not to have an "unusual adverse impact" on current employees, *id.*, its terms cannot be limited by pre-existing private contractual

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[10] Issues concerning restoration of seniority to reinstated class members may not properly be before this Court for two reasons: (1) the Union's petition for a writ of certiorari in No. 80-951 included a question concerning the appropriateness of the remedy of rightful place competitive seniority. That aspect of the petition was dismissed as improvidently granted by this Court. 49 U.S.L.W. 3863 (U.S. May 19, 1981); (2) because the Court has limited the issues on review primarily to those raised by the district court's settlement order, issues concerning the district court's seniority order may well be irrelevant at this stage of the proceeding. See The Brief On The Merits Of The Plaintiff Class. *Cf.* Motion By Trans World Airlines, Inc., To Limit Review in No. 80-951 To Issue of Seniority And Treat Nos. 78-1545 and 78-1549 as Moot, filed April 15, 1981, at 4-11.

relationships. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

It has long been the law that in preventing discriminatory practices and violations of federal law, district courts have discretion to issue orders affecting private agreements, including those under collective bargaining. *J. I. Case Company v. NLRB*, 321 U.S. 332 (1944); *Philadelphia, B. & W. R.R. Co. v. Schubert*, 224 U.S. 602 (1912). Citing *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), this Court noted in *Franks* that "enhancing the seniority status of certain employees for purposes of furthering public policy interests" is permissible, "even though this will to some extent be detrimental to the expectations acquired by other employees" under previous arrangements. 424 U.S. at 778-79.

Because of Title VII's emphasis on voluntary compliance, the presumptive validity of Title VII settlements [11] augments the burden objectors normally must overcome to defeat a settlement. As one district court approving a proposed consent decree under Title VII has stated:

> When objections to the settlement are presented, the burden must be on the objectant to convince the Court to disapprove the proposed settlement, and the trial court's reasoned approval of the settlement will be entitled to much deference. Otherwise, the policy of voluntary compliance with Title VII could be severely thwarted by the interposition of objections to the settlement.

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[11] *United States v. City of Alexandria*, 614 F.2d 1358, 1361 (5th Cir. 1980); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

United States v. City of Philadelphia, 499 F. Supp. 1196, 1199 (E.D. Pa. 1980) (citation omitted). Particularly where the district court has acted so scrupulously to hear and pass upon the objections of the intervenor Union, as it did in this case, 630 F.2d at 1169, the court cannot be said to have abused its discretion in approving a settlement that allowed for retroactive seniority. See *Moore v. City of San Jose*, 615 F.2d 1265 (9th Cir. 1980); *cf. Protective Committee v. Anderson*, 390 U.S. 414 (1968).

B. Although Unnecessary to the Resolution of this Case, the Court of Appeals Nevertheless Ruled Properly that the Prosecution of Subclass B Member Claims Should be Barred as Untimely

The judgment under review in No. 78-1545 raises the question whether the court of appeals properly held the Subclass B member claims untimely filed, and thus barred from further prosecution. Consistent with the principles of law previously explicated in this brief, we submit that a resolution of this issue is unnecessary and, accordingly, that this Court should dismiss the appeal as moot in light of the settlement. If the Court deems it appropriate to reach the merits of the judgment in No. 78-1545, however, we urge the Court to reaffirm its strict reading of the time filing requirement under Title VII and affirm the judgment below.

Title VII of the Civil Rights Act of 1964 unequivocally states that employment discrimination charges "shall be filed" within a relevant time period, which in this case was 90 days. 42 U.S.C. § 2000(d) (1970). Congress' use of the imperative establishes a strict requirement. Absent a continuing violation sufficient to negate a late filing defense, Subclass B

Members should be barred from prosecuting their claims.[12]

Having determined that the 90-day time limitation was not met, the court of appeals readily concluded that the claims of Subclass B members failed to satisfy what this Court has repeatedly termed a jurisdictional prerequisite to suit under Title VII. 582 F.2d

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[12] Although all members of Subclass B were terminated more than 90 days before the plaintiff class filed its charge with EEOC, See I J.A. 112, the district court concluded that their claims were timely because of the continuation of the subject employment policy. Concerned that the broad application of the "continuing violation" theory would vitiate Title VII's filing requirement, however, the court of appeals reversed the district court's ruling, and held that the time limits were to be measured from the time of the relevant, discrete employment decisions. 582 F.2d at 1149.

Subsequent interpretation of the effect of Title VII's time limits has strengthened the court of appeals' strict approach to the doctrine of continuing violation. As this Court stated in *Delaware State College v. Ricks*, 101 S. Ct. 498 (1980), determining the timeliness of an EEOC complaint requires a court "to identify precisely the 'unlawful employment practice' of which he complains." *Id.* at 503. In *Ricks* this Court concluded that the Title VII filing deadline must be measured from the day the employee is informed of his employer's decision to terminate his employment, and not from his last day of employment. *Id.* at 504. This Court reiterated its declaration in *United Air Lines, Inc. v. Evans*, 431 U.S. at 558, that mere continuity of employment is insufficient to prolong the life of an employment discrimination complaint. 101 S. Ct. at 504. Accordingly, the Seventh Circuit's declaration that "[p]ermanent severance of the employment relationship destroys the ties through which the direct impact of discrimination may be transmitted," 582 F.2d at 1149, has proved, particularly in retrospect, to be a sound exposition of the limitations of the continuing violation theory.

at 1151, *citing United Air Lines, Inc. v. Evans*, 431 U.S. at 555 n.4 ("Timely filing a prerequisite to the maintenance of a Title VII action"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (timely filing a "jurisdictional prerequisite"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973) (filing a timely charge jurisdictional prerequisite to federal action). Again, we submit, the strict reading of Title VII's timely filing limitation by the court of appeals was correct. For as this Court stated in *Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229, 240 (1976):

> Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisite 'with precision,' *Alexander v. Gardner-Denver Co.*, 415 U.S. at 47, . . . Congress did not leave to courts the decision as to which delays might or might not be 'slight.'

This Court has had occasion to address the validity of equitable defenses to Title VII's time limitation requirements. On those occasions, it has consistently rejected their use and reaffirmed the strict application of the time limits. In *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), for example, the Court considered whether the comparable 180-day period would be tolled because plaintiff was pursuing a grievance procedure established under a collective bargaining agreement. Although this Court occasionally referred to the filing require-

ment as a "limitations period," it considered and rejected no less than five variations on the tolling argument.

This Court recently underscored its strong position against tolling of the filing requirement in *Delaware State College v. Ricks*, 101 S. Ct. 498 (1980). Noting that the filing requirement not only guarantees the protection of the civil rights laws to those who promptly assert their rights, but "also protects employers from the burden of defending claims from employment decisions that are long past," this Court rejected equitable tolling. 101 S. Ct. at 505. "It should not be forgotten," said this Court, "that time-limitations themselves promoted important interests." *Id., citing Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 ("the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones"), and *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980).[13]

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[13] In accordance with the circuit court's decision below, other federal courts have acknowledged that the time requirements set by Congress are designed to safeguard defendants, as well as agencies and courts, from stale claims. See *Gautam v. First National City Bank*, 425 F. Supp. 579, 585 (S.D.N.Y. 1976), *aff'd mem.*, 575 F.2d 1290 (2d Cir. 1977); *see also Loos v. Gerarge*, 374 F. Supp. 1338, 1340 (D. Hawaii 1974) (isolated and completed acts against a particular subjective viewpoint of the aggrieved "do not give the Plaintiff a perpetual right to file charges before the EEOC"); *Hickman v. Queen*, 15 FEP Cases 953, 955 (S.D. Ohio 1976).

These cases demonstrate that however Title VII's time limits are characterized, the availability of equitable defenses as a shield against their operation is highly circumscribed. Indeed, the *strictness* of the Title VII filing requirement, as intended by Congress and reaffirmed by this Court, is far more important as an operative principle than the formal label attached to the time requirements. For even in cases where a court has ruled that the filing requirements are not jurisdictional but susceptible to equitable tolling, the time limits have been construed strictly. "We have cautioned," said the Sixth Circuit, "that the concept [of equitable tolling] is not an escape valve through which jurisdictional requirements will evaporate since '[t]he tolling of the statutory periods on equitable grounds is usually very much restricted'." *Brown v. Mead Corp.*, 25 FEP Cases 684, 685 (6th Cir. 1981), *citing Geromette v. General Motors Corp.*, 609 F.2d 1200, 1203 (6th Cir. 1979), *cert. denied*, 446 U.S. 985 (1980).

Similarly, in *Carlile v. South Routt School Dist.*, 26 FEP Cases 281 (10th Cir. 1981), the Tenth Circuit reaffirmed its previously established rule that in order to toll Title VII's strict time limitation on filing a notice of intent to sue, only "active deception" would suffice. *Id.* at 284, *citing Cottrell v. Newspaper Agency Corporation*, 590 F.2d 836 (10th Cir. 1979). The Tenth Circuit opinion drew upon comparable language of the Second Circuit in *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978):

> [T]he decision in *Electrical Workers* strongly suggests that, even assuming the Title VII time limits are not strictly jurisdictional, the tolling

> of those limits may be very restricted. The [Supreme] Court implied that tolling might be appropriate only where the defendant has actively misled the plaintiff respecting the cause of action, or where the plaintiff has in some extraordinary way been prevented from asserting his rights, or has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Casting aside questions of form, therefore, and concentrating upon the *substance* of the time limits and their importance to Title VII's statutory scheme, it is plain that the requirements are strict and are designed to be enforced in all but the most egregious circumstances. On the record now before this Court, it cannot be said such circumstances exist.

Viewed in the proper context, there are no policy reasons to permit the IFFA to gain the benefit of the "jurisdictional prerequisite" construction of Title VII's filing requirements. Arguments favoring strict adherence to the filing requirement are based upon policy concerns that defendants not be unfairly surprised or subject to delayed claims that become more difficult to defend over the course of time when witnesses may no longer be available and documentary evidence is more difficult to obtain. Quite simply, the decision whether or not to invoke such a defense is within the province of the party for whom the filing requirement was designed to protect. If the IFFA's right to object to the merits of the settlement were not fully protected before the district court, that would be another matter. But it would not be consonant with the voluntary resolution underpinnings of Title VII to set aside an otherwise valid settlement

merely because one of the issues disposed of by the parties related to an open legal question of the timeliness of the plaintiffs' EEOC charges.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals in No. 80-951 be affirmed and the appeal in No. 78-1545 be dismissed as moot in light of the settlement. If the Court deems it appropriate to reach the merits in No. 78-1545, the judgment there under review also should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ANNE B. ZIPES, ET AL., PETITIONERS

v.

TRANS WORLD AIRLINES, INC.

INTERNATIONAL FEDERATION OF FLIGHT ATTENDANTS, PETITIONER

v.

TRANS WORLD AIRLINES, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether the charge-filing limitation period of Section 706 of the Civil Rights Act of 1964 is subject to equitable modification.

2. Whether, in the circumstances of this case, the district court had jurisdiction to approve a settlement granting relief to all members of the plaintiff class.

3. Whether a district court may approve a Title VII class action settlement between the defendant-employer and the plaintiff class which provides, among other things, for the restoration of seniority, when a union representing the incumbent employees has intervened at the time of settlement to argue that the seniority provision will adversely affect incumbents.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 78-1545

ANNE B. ZIPES, ET AL., PETITIONERS

v.

TRANS WORLD AIRLINES, INC.

No. 80-951

INTERNATIONAL FEDERATION OF FLIGHT ATTENDANTS, PETITIONER

v.

TRANS WORLD AIRLINES, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission is charged with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 2000e *et seq.* The Department of Justice also has important enforcement responsibilities under Title VII. In No. 78-1545, the question presented for review is whether the charge-filing period of Section 706(d) of Title VII is an ordinary limitations period subject to equitable modification. In No. 80-951, certain questions are presented concerning the restoration of seniority in connection with a court-approved settlement of a Title VII class action pursuant to an agreement reached by the plaintiffs and the defendant-employer, when the union

representing incumbent employees is not a party, but intervenes to object. These questions are of great practical importance to the proper enforcement of Title VII.

STATEMENT

1. TWA's practice before 1970 was to require the resignation, or transfer to a ground position, of any flight attendant who became a mother through birth or adoption (Pet. App. A3).[1] In June 1970, ALSSA, which was then the bargaining representative for TWA flight attendants, challenged the lawfulness of this policy under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (1970 ed.) 2000e *et seq.*, by filing a charge with the Commission (I J.A. 27a). On August 18, 1970, after the Commission had issued a right-to-sue letter, ALSSA brought this class action in the United States District Court for the Northern District of Illinois, on behalf of all TWA flight attendants who had been affected by the policy since the effective date of Title VII (I J.A. 4a-8a). In its answer, TWA admitted jurisdiction and asserted no untimeliness defense with respect to those class members who had been terminated more than 90 days (see Section 706(d) of Title VII, 42 U.S.C. (1970 ed.) 2000e-5 (d)) before the filing of ALSSA's charge (I J.A. 8a-12a). Thereafter, in October 1970, ALSSA and TWA agreed in collective bargaining to discontinue this policy, leaving for litigation only the claims of persons who had been affected by it.

In 1971, ALSSA and TWA agreed to settle this litigation. The agreement provided that class members would be rehired without back pay, and with only the amount of union or "competitive" seniority held at discharge (I J.A. 17a-26a).[2] A settlement hearing was held, at which time counsel for TWA expressly waived any possible

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[1] "Pet. App." refers to the appendix to the petition in No. 78-1545. "IFFA Pet. App." refers to the appendix to the petition in No. 80-951. "I J.A." and "II J.A." refer, respectively, to volumes one and two of the joint appendix filed in this Court.

[2] ALSSA had not specifically sought restoration of seniority or reinstatement in its prayer for relief (I J.A. 7a-8a).

limitations defense (Pet. App. A28). The settlement was approved by the court over objections lodged by certain individual class members, including those who are now petitioners in No. 78-1545. The court of appeals set aside the settlement on the ground that ALSSA was not an adequate class representative because it owed conflicting duties, with respect to matters of reinstatement and retroactive seniority, to the class members and incumbents. This Court denied certiorari. See *Airline Stewards & Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974).

2. On remand, petitioners in No. 78-1545 were appointed as class representatives to replace ALSSA, and this action was consolidated with similar suits against American Airlines.[3] In September 1974, TWA moved to amend its answer to assert, as an affirmative defense, that "[p]laintiffs and members of the class failed to file charges with the Equal Employment Opportunity Commission within 180 days after the alleged unlawful employment practices occurred with the result that their claims are barred by the statute of limitations under Section 706(e) of Title VII" (I J.A. 89a).[4] The court granted TWA's motion, but stated: "[TWA's] delay in pleading the defense of limitations may well ultimately constitute a waiver of the defense; at this juncture, however, the Court is not convinced to a legal certainty that pleading of the defense shall not be allowed" (Pet. App. A27).

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[3] In July 1974, the plaintiff class filed a second Title VII lawsuit against TWA and ALSSA, in which it was alleged that ALSSA and TWA had agreed during the pendency of the settlement appeal to reemploy only those class members who disassociated themselves from the appeal (I J.A. 79a-87a).

[4] Before 1972, Title VII provided that charges were to be filed with the Commission within 90 days of the occurrence of an alleged unlawful employment practice. See Section 706(d) of Title VII, 42 U.S.C. (1970 ed.) 2000e-5(d). When Title VII was amended in 1972, the period was extended to 180 days. See Pub. L. No. 92-261, 86 Stat. 105 (42 U.S.C. 2000e-5(e)).

3. On October 15, 1976, the district court denied (I J.A. 130a-132a) the airlines' December 1975 motion (*id.* at 102a) to exclude, for lack of subject matter jurisdiction, those class members who had been terminated more than 90 days before the filing of the charge. Although the district court adopted the airlines' argument that the charge-filing time limit was jurisdictional in nature, the court held that the claims of all class members were timely because the airlines' continued adherence to their "no motherhood" policies, until October 1970, precluded the reemployment of all flight attendants who had become mothers, and therefore constituted a violation that continued until after the charge had been filed (*id.* at 126 n.1, 132a). Thereafter, on October 18, 1976, the court entered summary judgment against TWA on the issue of liability (*id.* at 133a-134a). Finding no disputed questions of material fact, the court held (*id.* at 134a) that "TWA's 'no motherhood' policy * * * violat[ed] * * * § 703(a) of the Civil Rights Act, 42 U.S.C. § 2000e-2 (a)."[5] On December 16, 1976, the district court amended the foregoing "orders * * * granting summary judgment * * * and * * * denying * * * [the] motion to exclude * * * by adding * * * to each order: This court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" (I J.A. 135a).

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[5] In granting summary judgment on the issue of liability, the court relied on an earlier opinion (I J.A. 126a-129a) in which the court had held that American's "no motherhood" policy violated Title VII because "female parents as a class have been subjected to employment impediments to which male parents have not been subjected" (*id.* at 127a). Based on the extensive evidentiary materials submitted by the parties, the district court concluded that "the issues in this case are controlled by the court's previous opinion and the authority cited therein" (*id.* at 133a).

Thereafter, on February 3, 1977, the court of appeals granted leave to appeal under 28 U.S.C. 1292(b).[6] On August 24, 1978, the court of appeals entered its opinion, which affirmed the district court's granting of summary judgment on the issue of TWA's liability, but rejected the district court's "continuing violation" theory. The court of appeals then held that compliance with the 90-day filing period was a jurisdictional prerequisite that was not subject to equitable modification, and the court therefore found untimely the claims of those class members who had been permanently discharged more than 90 days before the charge was filed (Pet. App. A1-A17). Petitions for rehearing and for modification were denied (*id.* at A19-A20).

4. In April 1979, separate petitions for a writ of certiorari were filed by the class representatives (No. 78-1545) and TWA (No. 78-1549). On motion of the parties, the court of appeals stayed its mandate under Fed. R. App. P. 41(b), and this Court deferred consideration of the petitions pending settlement discussions. A tentative agreement was reached in June 1979. The agreement provided that the class would be divided into Subclasses "A" and "B." The members of Subclass A—women who were terminated or became mothers either within the 90 days preceding the filing of the charge or thereafter, as well as women who were reinstated in ground positions during those periods—were to receive a pro rata share of $1.5 million; an identical sum was to be divided among the members of Subclass B, a larger group consisting of women who had been discharged, or who had become mothers, more than 90 days before the filing of the charge (IFFA Pet. App. 24a-26a). Reemployment with full "benefit" (company) seniority was guar-

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[6] The docket does not reflect the entry of any stay pending appeal. See 29 U.S.C. 1292(b). While this appeal was pending, the district court approved a settlement, over union objection, in the companion suit against American. The court of appeals affirmed, and this Court denied certiorari. See *Airline Stewards & Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (7th Cir.), cert. denied, 439 U.S. 876 (1978).

anteed to the members of both subclasses, subject to the existence of vacancies and the ability of the individuals to meet TWA employment standards and other settlement terms (*id.* at 29a-32a). The agreement also originally provided that each class member would receive full "competitive" (union) seniority unless an interested third party objected, in which case the district court would determine whether to grant seniority beyond that held at discharge (*id.* at 29a-30a).

IFFA, which had become the bargaining representative for TWA flight attendants in 1977, intervened in July 1979, after the settlement was presented to the district court for approval under Fed. R. Civ. P. 23(e). IFFA objected to the settlement terms on the ground that they would adversely affect incumbents; IFFA also challenged the court's jurisdiction to approve the settlement as well as its authority to restore seniority (II J.A. 11-14). After IFFA had intervened, the settlement agreement was modified to authorize the district court to determine the amount of union seniority that should be restored (IFFA Pet. App. 21a).

The district court ruled on IFFA's jurisdictional objections on September 14, 1979 (IFFA Pet. App. 13a-15a). Given the action of the court of appeals in staying its mandate pending this Court's consideration of the parties' petitions for a writ of certiorari, the district court concluded that it retained authority to act on the proposed settlement, notwithstanding the opinion of the court of appeals concerning the untimeliness of the Subclass B claims. The district court reasoned that "the parties to the controversy are free to settle their differences prior to the issuance of the mandate," and that they should not be "forced against their will to continue a legal battle before the Supreme Court in a winner-take-all contest which neither party desires to risk" (*id.* at 15a).

Thereafter, the district court conducted hearings and received voluminous documentary evidence concerning the fairness and adequacy of the settlement (see, *e.g.*, II

J.A. 22-211). Among other things, the evidence showed that approximately 33 members of Subclass A and 172 members of Subclass B were expected to seek reemployment, whereas TWA's complement of flight attendants numbered approximately 7,000 (*id.* at 87, 137-138). On November 8, 1979, the district court entered an order finding that the settlement was "fair, reasonable and adequate for the parties and Subclasses A and B" (IFFA Pet. App. 16a-17a). The court also dismissed the underlying action, but retained jurisdiction to determine the question of union seniority, to enforce the settlement, and to determine attorneys' fees and costs (*ibid.*). On the same date, the district court entered a second order which restored to each class member currently employed by TWA, or to be reemployed under the agreement, the full union seniority that she would have had but for her discharge. Based on the evidence before it, the court found that "full restoration of retroactive seniority will not have an unusual adverse impact upon currently employed flight attendants in a manner which is not typical of other Title VII cases" (*id.* at 18a-19a).

5. IFFA appealed, and the court of appeals affirmed the judgment of the district court (IFFA Pet. App. 1a-10a). The court of appeals rejected IFFA's contention that the district court lacked jurisdiction, because of its own previous decision, to approve a settlement granting any benefit to members of Subclass B. Relying on its decision in *Airline Stewards & Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (7th Cir.), cert. denied, 439 U.S. 876 (1978) (see note 6, page 5, *supra*), the court noted that the union's objections were to be evaluated in light of legal principles applicable to judicial review of settlements, and the district court was not required to decide the merits of the controversy that was being compromised (IFFA Pet. App. 5a-6a). In this case, the court of appeals noted (*id.* at 7a):

> There is a crucial issue, that of jurisdiction as to Subclass B, which has not been finally determined because a challenge to our decision is still pending

> before the United States Supreme Court. Both parties to the settlement believed it in their interests to approve the settlement rather than await the action of the Supreme Court. Not only does their compromise reflect their perception that the ultimate resolution of this issue could not be predicted with certainty, but prior case law also left the law on this matter open to question.

Given these circumstances, together with the district court's unquestionable jurisdiction over the Subclass A claims, the court of appeals concluded that the district court had jurisdiction to rule on the settlement because "parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement that is otherwise appropriate for district court approval" (*id.* at 9a).

The court of appeals further held that the district court had not abused its discretion in approving the settlement agreement or in restoring seniority. The district court had properly considered the fairness, reasonableness, and adequacy of the settlement as to the class, as well as its effects upon the public and other parties, such as IFFA, and the agreement provided substantial awards to class members, thus serving the statutory policy of remedying past acts of discrimination (IFFA Pet. App. 9a-10a). Moreover, the reinstatement provision would not displace any incumbent employee; reinstatement would be accomplished through normal attrition in less than six months (*id.* at 10a). Finally, the court of appeals noted that the district court had determined that restoration of full union seniority would have no unusual adverse impact on incumbents (*ibid.*).

A petition for rehearing was denied on September 17, 1980 (IFFA Pet. App. 11a), and IFFA filed a petition for a writ of certiorari (No. 80-951) on December 12, 1980.

SUMMARY OF ARGUMENT

IFFA mounts a two-pronged attack on the settlement that the district court approved in this 11-year-old litigation between TWA and the members of the plaintiff

class, who were deprived of their employment because of TWA's "no motherhood" policy. First, IFFA contends that the district court lacked jurisdiction to approve the settlement with respect to the claims of the members of Subclass B because the court of appeals had held, prior to the time that the settlement was approved, that the Subclass B claims were jurisdictionally infirm. Second, IFFA contends that the district court should not have approved the settlement, which included restoration of seniority, because IFFA did not consent, and, in its view, seniority may never be restored in a Title VII settlement without union consent. There is no merit to either of these contentions.

First, IFFA's jurisdictional claim rests on the fact that, prior to the district court's approval of this settlement, the court of appeals had held that the district court lacked jurisdiction over the Subclass B claims for the reason that the members of Subclass B had not filed charges with the Commission within 90 days of their discharges, in compliance with Section 706(d) of Title VII, 42 U.S.C. (1970 ed.) 2000e-5(d). The court of appeals based its holding on the ground that this time limitation was "jurisdictional" and not subject to equitable modification. Whether the holding of the court of appeals is correct is the question presented in No. 78-1545. As we shall show, this holding is inconsistent with the language, legislative history, and statutory policy of Title VII, as well as with the settled principle that statutory limitations periods should be construed, in the absence of contrary legislative intent, as ordinary statutes of limitation subject to equitable modification. Because the holding of the court of appeals was erroneous, the district court had jurisdiction. However, even if this Court should now hold that the charge-filing period is jurisdictional, there is ample ground for concluding that the district court had the authority to approve the settlement in the peculiar circumstances of this case.

Second, there is no merit to IFFA's contention that seniority may never be restored in a settlement without

the consent of a nonparty union representing incumbent employees. If IFFA were correct, a nonparty union would have a virtual veto over a settlement—a veto which it seldom, if ever, could be expected to refrain from exercising, at least in circumstances such as those presented here. IFFA's position is thus incompatible with Title VII's statutory policy of securing relief through voluntary means where possible, and it would seriously impede the statutory goal of "making whole" victims of discrimination. Although the seniority interests of incumbents are important, such interests are afforded adequate protection where, as here, the incumbents have an opportunity to object and present evidence on the fairness of the settlement. It is too much to ask that they also be allowed to rule on the merits of their own objections.

ARGUMENT

I. THE TITLE VII CHARGE-FILING PERIOD IS AN ORDINARY STATUTE OF LIMITATIONS SUBJECT TO EQUITABLE MODIFICATION

In 1978, the court of appeals held that the district court lacked subject matter jurisdiction over the Subclass B claims because compliance with the charge-filing time period was a "jurisdictional" requirement that was not subject to waiver[7] or other equitable modification (Pet. App. A15). This holding, which is inconsistent with the current law of every other circuit that has decided the issue,[8] is plainly incorrect. The language, legis-

[7] The court of appeals noted (Pet. App. A15) that, "[t]here is no dispute that [TWA] failed to raise [the timeliness] issue in the pleadings."

[8] The Fifth Circuit has recently noted that some confusion exists in the case law because "the jurisdictional label has often been used loosely, and sometimes interchanged in the same opinion with statute of limitations terminology." *Coke* v. *General Adjustment Bureau, Inc.*, 640 F.2d 584, 591 (1981) (en banc). Accord, *Reynolds* v. *Sheet Metal Workers, Local 102*, No. 80-1378 (D.C. Cir. Mar. 31, 1981), slip op. 6; *Hart* v. *J.T. Baker Chemical Corp.*, 598 F.2d 829, 832-833 (3d Cir. 1979). See also *Reeb* v. *Economic*

lative history, and statutory policy of Title VII not only fail to support the view that the charge-filing period is "jurisdictional," but affirmatively demonstrate that it is an ordinary statute of limitations subject to equitable modification. The decision below is also inconsistent with the well-established principle that, absent contrary evidence of legislative intent, statutory limitations periods are generally to be construed as ordinary statutes of limitations subject to equitable modification.

1. This Court has long recognized that federal courts ordinarily have the equitable power to excuse compliance, in appropriate circumstances, with time periods pre-

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Opportunity Atlanta, Inc., 516 F.2d 924, 927-928 (5th Cir. 1975) (Wisdom, J.). After thoroughly surveying the case law, the Fifth Circuit has concluded, however, that the Seventh Circuit currently stands alone in holding that timely compliance with the charge-filing provision is "jurisdictional" in the sense that compliance vel non determines the jurisdiction of the district court, without regard to equitable modification based on the circumstances of a particular case. *Coke* v. *General Adjustment Bureau, Inc.*, *supra*, 640 F.2d at 589.

Six courts of appeals have held that the charge-filing period is subject to equitable modification. See *Hart* v. *J.T. Baker Chemical Corp.*, 589 F.2d 829, 832-833 (3d Cir. 1979); *Oazaca* v. *Roscoe*, 641 F.2d 386 (5th Cir. 1981); *Leake* v. *University of Cincinnati*, 605 F.2d 255, 259 (6th Cir. 1979); *Cooper* v. *Bell*, 628 F.2d 1208, 1212-1214 (9th Cir. 1980); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779, 781 (9th Cir. 1972); *Sanchez* v. *Trans World Airlines, Inc.*, 499 F.2d 1107, 1108 (10th Cir. 1974); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 474 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978).

The Fourth Circuit has not considered the issue with respect to the charge-filing period, but it has held that the suit-filing limitation period (Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1)) is subject to equitable modification. *Stebbins* v. *Nationwide Mutual Insurance Co.*, 469 F.2d 268, 269 (1972), cert. denied, 410 U.S. 939 (1973). The First and Second Circuits have left the question open. *Daughtry* v. *King's Dep't Stores, Inc.*, 608 F.2d 906, 909 (1st Cir. 1979); *Smith* v. *American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978). In *Satz* v. *ITT Financial Corp.*, 619 F.2d 738, 745 n.11 (1980), the Eighth Circuit noted that, "Congress appears to have regarded the time period as a statute of limitations."

scribed by statute. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 558-559 (1974); *Burnett* v. *New York Central R.R.*, 380 U.S. 424 (1965); cf. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946); *Herb* v. *Pitcairn*, 325 U.S. 77 (1945).[9] Indeed, the principle is so deeply embedded in our jurisprudence that it must be assumed to apply to a particular limitations period absent some contrary indication of legislative intent. *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231, 234-235 (1959). The court below did not bring these principles to bear upon its analysis (see Pet. App. A15-A17), but held that equitable modification was unavailable because the charge-filing requirement is "jurisdictional." There is no basis for that conclusion.

Whether a court has subject matter jurisdiction "is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case." *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979). Thus, as Justice Holmes said for the Court, "Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought." *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). Here, jurisdiction rests on Section 706(f)(3) of Title VII, 42 U.S.C. 2000e-5(f)(3), which provides in part

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[9] Despite the general availability of equitable modification in appropriate circumstances, statutes of limitations are not easily avoided. Because a limitations provision represents "the balance struck by Congress" between the plaintiff's right to enforce his claim and the defendant's right to be free from having to defend against stale claims, a court is "not free to construe it so as to defeat its obvious purpose * * * [of] encourag[ing] the prompt presentation of claims." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). See also *Order of R.R. Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349 (1944). Principles of waiver, estoppel and tolling will be invoked successfully only when the "congressional purpose is effectuated" by doing so "in given circumstances." *Burnett* v. *New York Central R.R.*, *supra*, 380 U.S. at 427. Because these principles serve the ends of substantial justice, however, they are presumed to be compatible with legislative intent, absent clear evidence to the contrary.

that "[e]ach United States district court * * * shall have jurisdiction of actions brought under this subchapter." This section also makes provision, at some length, for determining where venue will lie in a Title VII action (*ibid.*). It must be emphasized, however, that Section 706(f)(3) is separate and distinct from the charge-filing section, that it contains no reference to the charge-filing requirement, and that it certainly does not purport to limit the jurisdiction of the federal courts to cases in which the plaintiff has complied with the charge-filing period. Neither does the charge-filing section purport to condition the jurisdiction of the federal courts upon compliance with this requirement. See Section 706(d) of Title VII, 42 U.S.C. (1970 ed.) 2000e-5(d); Section 706(e) of Title VII, 42 U.S.C. 2000e-5(e). The two sections plainly deal with different subject matters and serve different purposes. While the one deals with the jurisdiction of the federal courts, the other deals with proceedings before the Commission. Neither the court below nor IFFA has produced any evidence to show that Congress intended to merge the charge-filing time requirement into the jurisdictional provision. Moreover, if that had been Congress' intention, it could easily have been accomplished.[10]

2. The legislative history, although sparse on this point, also strongly suggests that Congress intended the charge-filing period to be an ordinary statute of limitations. For many years before the enactment of Title VII, proponents of fair employment legislation had looked to the provisions of the National Labor Relations Act as a model (see 110 Cong. Rec. 7266-7267 (1964) (re-

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[10] Compliance with the charge-filing requirement is therefore relevant, not to the court's jurisdiction to hear the case, but to the question whether a particular plaintiff has an enforceable cause of action, that is, whether he "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Davis* v. *Passman*, *supra*, 442 U.S. at 240 n.18. See also *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). Moreover, the existence of a cause of action is a determination "of law * * *

marks of Sen. Ellender)),[11] and Congress borrowed liberally from that Act when it drafted Title VII in 1964. For example, it modeled the relief provisions of Title VII (Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g)) after Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c). See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768-770 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 & n.11, 420 & n.12 (1975). Likewise, it is clear that Congress modeled the charge-filing provision of Title VII after Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b).

The language of the two provisions is strikingly similar. Section 10(b) provides that "no complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *" (29 U.S.C. 160(b)). Section 706(d) of Title VII provided that "[a] charge * * * shall be filed within ninety days after the alleged unlawful employment practice occurred" (42 U.S.C. (1970 ed.) 2000e-5(d)). In addition to similar language, the two provisions have a common purpose: "to set in motion the machinery of an inquiry." *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 307 (1959). Compare *EEOC* v. *General Electric*, 532 F.2d 359, 369 (4th Cir. 1976); *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). See

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decided after and not before a court has assumed jurisdiction over the controversy." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946).

Indeed, this Court has explicitly rejected the contention that where the same statute both creates a cause of action and establishes a limitation upon the time within which the cause of action may be brought, " 'the time limitation is an integral part of [the] new cause of action . . . that * * * is irretrievably lost at the end of the statutory period.' " *American Pipe & Construction Co.* v. *Utah*, *supra*, 414 U.S. at 559, quoting *Glus* v. *Brooklyn Eastern Terminal*, *supra*, 359 U.S. at 232. See also *Burnett* v. *New York Central R.R.*, *supra*, 380 U.S. at 427 n.2.

[11] See also EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, at 2-3, 7-9 (1964); Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431 & n.2 (1966).

also 110 Cong. Rec. 14191 (1964) (remarks of Sen. Keating) ("The filing of a charge merely brings a matter to the attention of the Commission"). Similarly, it is the agency's investigation and determination, not the charge, that ultimately defines the alleged violation under both statutes. See *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 372-373 n.32 (1977).

Given these parallels, it is certainly significant that the charge-filing provision of Section 10(b) had been construed as a statute of limitations subject to equitable modification when Congress used it as a model for Title VII in 1964. See *NLRB* v. *A.E. Nettleton Co.*, 241 F.2d 130, 133 (2d Cir. 1957); *NLRB* v. *Clausen*, 188 F.2d 439, 443 (3d Cir. 1951); *NLRB* v. *Itasca Cotton Mfg. Co.*, 179 F.2d 504, 505-507 (5th Cir. 1950). See also *Machinists Lodge No. 1424* v. *NLRB*, 362 U.S. 411 (1960).[12] In these circumstances, it is fair to assume that Congress was aware of this construction and intended it to apply to Title VII as well. Cf. *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 133 (1943).

Although Congress did not extensively discuss the charge-filing provision in 1964, the remarks of the bill's sponsors support the view that this provision was intended to serve as a statute of limitations. Before the Senate floor debate on the House bill, Senator Case explained the House version of this provision in traditional statute of limitations terms: "to avoid the pressing of 'stale' claims, the title provides that no suit may be brought with respect to any practice occurring more than 6 months prior to the filing of a charge with the Com-

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[12] The courts have continued to construe the charge-filing provision of Section 10(b) as a statute of limitations subject to equitable modification. See *NLRB* v. *Local 264, Laborers' International Union*, 529 F.2d 778, 784-785 (8th Cir. 1976); *Shumate* v. *NLRB*, 452 F.2d 717, 720-721 (4th Cir. 1971); *A.H. Belo Corp.* v. *NLRB*, 411 F.2d 959, 966-967 (5th Cir. 1969), cert. denied, 396 U.S. 1007 (1970); *Chicago Roll Forming Corp.*, 167 N.L.R.B. 961, 971 (1967), enforced, 418 F.2d 346 (7th Cir. 1969).

mission." 110 Cong. Rec. 7243 (1964).[13] Following the Senate debate, which had resulted in the drafting of a substitute bill that was later enacted without change, Senator Humphrey referred to the 90-day period established in the substitute bill as a "period of limitations" (*id.* at 12723). These comments suggest that Congress intended the charge-filing period to be viewed as an ordinary statute of limitations;[14] they do not suggest

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[13] Moreover, in introducing the House version, Senator Humphrey had stated that the "suit against the respondent * * * brought by * * * the complaining party, would proceed in the usual manner for litigation in the Federal courts." 110 Cong. Rec. 6549 (1964).

[14] In *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 820 (1980), the Court reviewed the legislative history, noting that "it seems clear that the 90-day provision to some must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." Accord, *Delaware State College* v. *Ricks*, No. 79-939 (Dec. 15, 1980), slip op. 6. The Court's observation is consistent with the view that the 90-day period is a statute of limitations subject to customary principles of equitable modification. See, *e.g.*, *American Pipe & Construction Co.* v. *Utah*, *supra*, 414 U.S. at 556-559; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 325-333 (1971); *Sanger* v. *Nightingale*, 122 U.S. 176, 183 (1887). The holding in *Mohasco Corp.* is not to the contrary in that the Court there merely struck down an administrative interpretation that would have extended the filing period for all charging parties, without regard to the equities of a particular case. Moreover, although the Court observed in *Mohasco Corp.* that the plaintiff had also failed to comply with the analogous suit-filing time period (Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1)), the Court noted that the defendant had not asserted this failure as a defense, and therefore treated it as waived (447 U.S. at 811 & n.9). The Court thus implicitly held that the suit-filing period was not "jurisdictional" (see *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382 (1884)), and there is no good ground for distinguishing the two limitations periods for this purpose. Likewise, in *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976), the Court held that the pursuit of grievance procedures would not toll the running of the limitations period, but the Court did not do so on the ground that the period

that Congress intended to condition the existence of a cause of action under Title VII upon absolute compliance with the charge-filing period.[15]

The legislative history of the 1972 amendments, which enlarged the charge-filing period from 90 to 180 days, demonstrates even more clearly that Congress viewed the

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was "jurisdictional," and its careful consideration of the various arguments in favor of tolling strongly suggests that it did not view the limitations period as immune from equitable modification. See *Coke* v. *General Adjustment Bureau, Inc.*, *supra*, 640 F.2d at 587-589; *Hart* v. *J.T. Baker Chemical Co.*, *supra*, 598 F.2d at 833; *Smith* v. *American President Lines, Ltd.*, *supra*, 571 F.2d at 108-109. See also *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977) (upholding intervention by putative class member who had not filed Title VII charge). Like the courts of appeals (see pages 9-10, note 8, *supra*), this Court has sometimes referred to the charge-filing period as "jurisdictional" (see *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnel Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973)), where the distinction has not been material. See *Coke* v. *General Adjustment Bureau, Inc.*, *supra*, 640 F.2d at 587-589. More recently, however, the Court has referred to the charge-filing period as a "statute of limitations" or "limitations period." See *Delaware State College* v. *Ricks*, *supra*, slip op. 6; *Mohasco Corp.* v. *Silver*, *supra*, 447 U.S. at 822; *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 371-372 (1977).

[15] The only material changes in the charge-filing procedure that resulted from the Senate debate were the reduction of the filing period from six months to 90 days, and the addition of the requirement that charges be deferred to state and local agencies. The House bill contained a six-month limitations period without regard to the availability of state or local remedies. Section 707(d) of H.R. 7152, 110 Cong. Rec. 2511 (1964). The Senate substitute not only established a period in which state and local agencies would have exclusive jurisdiction (see 42 U.S.C. (1970 ed.) 2000e-5(b) and (c)), but it also provided different charge-filing limitations periods, depending upon whether state and local remedies were available. The charge-filing period in "non-deferral" jurisdictions was set at 90 days; the period for "deferral" jurisdictions was set at 210 days (see 42 U.S.C. (1970 ed.) 2000e-5(d)). The legislative history of these amendments likewise provides no suggestion that Congress intended the charge-filing limitations to be something other than an ordinary statute of limitations subject to equitable modification.

filing period as an ordinary statute of limitations. Both the House and Senate Committee reports refer to the enlarged period as either a "limitation period" or a "statute of limitations" that is "similar" or "identical" to the limitations period of the National Labor Relations Act.[16] Moreover, Congress specifically approved those decisions that had interpreted the limitations period to "give the aggrieved person the maximum benefit of the law," and it declared that the amendment's "extension of the time limitations" should not affect those interpretations. Joint section-by-section Analysis, 118 Cong. Rec. 7167, 7565 (1972). Although the 1972 legislative history cannot be dispositive of Congress' intent in 1964, of course, it is certainly entitled to significant weight, given the fact that nothing in the 1964 legislative history is inconsistent with the views that Congress expressed in 1972, and there is no reason to believe that Congress had a different intention in 1964. See *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Cannon* v. *University of Chicago*, 441 U.S. 677, 686 n.7 (1979).[17]

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[16] The Senate Committee described the 180-day charge-filing period as "a limitation period similar to that contained in [the] Labor-Management Relations Act, as amended (29 U.S.C. 160(b))." S. Rep. No. 92-415, 92d Cong., 1st Sess. 37 (1971). In H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 65 (1971), the minority stated: "Statute of limitations. Under the Committee bill, the time period in which individual charges of employment discrimination must be filed has been extended from 90 days to 180 days * * *; this is identical to the statute of limitations under the National Labor Relations Act. We concur in such extension."

[17] Similarly, in 1978, when Congress amended the Age Discrimination in Employment Act, 29 U.S.C. (Supp. III) 621 *et seq.*, which contains a charge-filing requirement analogous to that involved here (see Section 7(d)(1) of the Act, 29 U.S.C. (Supp. III) 626(d)(1)), Congress specifically stated that, "the 'charge' requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and * * * therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act. See, *e.g.*, *Dartt* v. *Shell Oil Co.* (10th Cir. 1976), affirmed by an evenly divided court, [434 U.S. 99,] 98 S. Ct. 600 (1977) * * *." H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 12 (1978).

3. The holding below is also inconsistent with the statutory policy of Title VII. As we have shown (see page 12, note 9, *supra*), the law of limitations is designed to strike the proper balance between the plaintiff's interest in having decided the merits of an otherwise valid claim and the defendant's interest in not having to defend against stale claims. Generally, this balance is struck by requiring that a claim be brought within a prescribed period of time, unless there are equitable grounds for excusing compliance. Only in exceptional cases is the balance struck elsewhere. Nonetheless, the court below has construed the charge-filing period as "jurisdictional," thereby creating a more formidable barrier to relief. This departure from general principles is not only unwarranted by the language and legislative history of Title VII, but it strikes a major blow at the statutory policy.

We note first that the charge-filing period is an unusually short limitations period, and the holding below is certainly not necessary to protect defendants against "stale" claims. More important, this Court has long recognized that unnecessary technicalities have no place under Title VII, which is a "statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972).[18] Not only does enforcement of Title VII depend in the first instance upon the filing of charges by persons who are unschooled in the niceties of the law, but the statutory scheme also places substantial reliance upon such persons to vindicate the public interest in uprooting employment discrimination by bringing private actions "which remain[ ] an essential means of obtaining judicial enforcement of Title VII." *Alexander* v. *Gardner-*

[18] See *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928 (5th Cir. 1975) (Wisdom, J.) ("It is reasonable, therefore, for courts to refuse to apply technical rules of common law pleading"); *Antonopulos* v. *Aerojet-General Corp.*, 295 F. Supp. 1390, 1395 (E.D. Cal. 1968) ("We are not dealing with businessmen-plaintiffs or plaintiffs accustomed to consulting lawyers about their rights").

Denver Co., 415 U.S. 36, 45 (1974).[19] Indeed, the private litigant has the unique role of a "private attorney general" as the "chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978), quoting *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). Accord, *EEOC* v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981), slip op. 11-12; *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 326 (1980).

Given the emphasis that Title VII places on the private right of action as the means for vindicating the important public interest embodied in this remedial statute, together with Congress' recognition that this enforcement scheme would depend upon the filing of charges by lay persons, without the assistance of lawyers, it is inconceivable that Congress would have intended to deprive Title VII plaintiffs of the same benefit of equitable modification that is generally available under federal law.[20]

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[19] The legislative history illustrates the important role that Congress assigned to private actions. The Senate substitute bill rejected the provision of the House bill giving the Commission the authority to bring suit, thus making private suits the primary method of obtaining judicial enforcement (110 Cong. Rec. 12721 (1964)), and it also strengthened the private right of action both by removing the requirement that private parties obtain the Commission's permission to sue (*ibid.*), and by providing for awards of attorneys' fees (*id.* at 12724). When Congress amended Title VII to authorize suits by the Commission, it nonetheless retained the private right of action because the "primary concern should be to protect the aggrieved person's option to seek a prompt remedy." S. Rep. No. 92-415, 92d Cong., 1st Sess. 24 (1971); see also section-by-section Analysis of the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. 7167 (1972).

[20] The history of congressional concern for individual rights under Title VII is far more compelling than that upon which the Court relied in *American Pipe & Construction Co.* v. *Utah*, *supra*, 414 U.S. at 558 n.29, to bolster the conclusion that generally accepted tolling principles should apply in cases brought under the antitrust laws. Indeed, this Court has emphasized that the federal courts, in exercising the broad equitable powers granted by Title

Certainly, such an intent is not to be presumed absent clear evidence in the language or legislative history, which is not present here. Indeed, as we have shown, the statutory scheme and pertinent legislative history suggest the contrary.

II. THE DISTRICT COURT HAD JURISDICTION TO ENTER A SETTLEMENT WITH RESPECT TO THE CLAIMS OF ALL CLASS MEMBERS

IFFA contends (Br. 37-42) that the 1978 decision of the court of appeals (Pet. App. A1-A17), holding that the charge-filing period was "jurisdictional," deprived the district court of jurisdiction to approve the settlement insofar as it concerned the claims of Subclass B.[21] As we have shown (see pages 10-21, *supra*), however, the 1978 holding of the court of appeals was erroneous, and it is therefore clear that the district court had subject matter jurisdiction when it entered the settlement.[22] But even if this Court should agree with the 1978 holding of the court of appeals, the district court's order approving the settlement (IFFA Pet. App. 16a-17a) should nonetheless be affirmed.

VII, possess ample authority "to locate 'a just result' in light of the circumstances peculiar to the case." *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 373, quoting *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 424-425, and *Langnes* v. *Green*, 282 U.S. 531, 541 (1931). See also *Holmberg* v. *Armbrecht*, *supra*, 327 U.S. at 395.

[21] IFFA now appears (see Br. 37-42) to challenge the district court's authority to approve the settlement with respect to both subclasses. In its petition, however, IFFA conceded the court's jurisdiction to approve the settlement insofar as the Subclass A claims were concerned (IFFA Pet. 9 n.11). IFFA apparently believes that its new position is more consistent with the argument that a court may never approve a settlement that "supersedes" a collective bargaining agreement unless the union consents. See pages 24-31, *infra*.

[22] The question of compliance with the time-filing requirement is one relating to the existence of the Subclass B members' cause of action, not to the court's jurisdiction. Even if a failure to comply with the charge-filing requirement could not equitably be excused

Notwithstanding its earlier holding that the filing period was "jurisdictional," the court of appeals properly found (IFFA Pet. App. 1a-10a) that the district court had the authority, in light of all the circumstances, to approve this settlement under Fed. R. Civ. P. 23(e). The earlier decision of the court of appeals had been rendered in an appeal brought under 28 U.S.C. 1292(b), a stay of the proceedings in the district court had not been entered, the mandate of the court of appeals had been stayed, and a petition for a writ of certiorari had been filed seeking review in this Court of the "jurisdictional" holding of the court of appeals. A conflict among the circuits evidenced not only that the issue was substantial, but also that the ultimate resolution of the issue could not be predicted with certainty by either party.[23] Moreover, the jurisdiction of the district court over the action was clear because no question could be raised concerning the court's jurisdiction over the Subclass A claims.[24] In these circumstances, the court of appeals

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in any circumstances, the issue of compliance would still be a question relating to the existence of the cause of action, which goes to the merits. See *Bell* v. *Hood*, *supra*, 327 U.S. at 682. *Cf. Oaxaca* v. *Roscoe*, *supra*, 641 F.2d at 391 (Title VII time limits are not "jurisdictional," and "dismissal for failure to act timely * * * is properly raised by a Rule 12(b)(6), Fed. R. Civ. P., motion for failure to state a claim"). Moreover, under Fed. R. Civ. P. 23(e), the parties may compromise any disputed issue of fact or law going to the merits of the cause of action, and any question concerning such issues is irrelevant to determining whether the court has authority to approve the settlement, although such questions may affect the court's exercise of discretion in deciding whether to approve the settlement over the objections of affected nonparties. See pages 28-30, *infra*.

[23] Indeed, in the year preceding settlement, two courts of appeals had specifically rejected the view that the charge-filing period is "jurisdictional." See *Leake* v. *University of Cincinnati*, *supra*, 605 F.2d at 259; *Hart* v. *J.T. Baker Chemical Co.*, *supra*, 598 F.2d at 831-833.

[24] Furthermore, the settlement encompassed two separate class actions. In addition to the principal action, a second suit alleging retaliation (see I J.A. 79a-87a) was also before the court, and that

properly held (IFFA Pet. App. 8a, quoting *id.* at 15a) that the parties should not " 'be[ ] forced against their will to continue a legal battle before the Supreme Court in a winner-take-all contest which neither party desires to risk.' " [25]

The mandate of the court of appeals having been stayed, the district court was not bound by its decision. See *Bailey* v. *Henslee*, 309 F.2d 840 (8th Cir. 1962); see also *Alphin* v. *Henson*, 552 F.2d 1033 (4th Cir. 1977). Moreover, the legal effect of a stay of mandate is to maintain the status quo between the parties to the appeal. *Algonquin Gas Transmission Co.* v. *Township of Bernards*, 112 F. Supp. 86, 90 (D.N.J. 1953). Here, the status quo was determined by the district court's previous orders in which it had found both jurisdiction and liability with respect to the claims of all class members, and the district court was clearly correct in finding (IFFA Pet. App. 15a) that "[i]mplicit in the mainte-

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action was also compromised as part of the settlement (see IFFA Pet. App. 13a). The court's jurisdiction with respect to the claims of all class members in the retaliation case was never questioned.

[25] IFFA contends (Br. 43) that although the Subclass B claims could not be settled with court approval under Fed. R. Civ. P. 23(e), the members of Subclass B would nonetheless not be compelled to litigate against their will because they could settle without court approval. However, IFFA does not, and cannot, explain how such settlements could be accomplished without subverting the provisions of Rule 23(e), the purpose of which is to protect the interests of all class members in the event of dismissal or compromise. To guarantee this protection, the rule is mandatory. 3B *Moore's Federal Practice* ¶ 23.80[2.-1] (2d ed. 1980). Thus, court approval is required in any compromise of a class action reached after a decision but before entry of judgment. Cf. *id.* at ¶ 23.1.24[2]; *Winkelman* v. *General Motors Corp.*, 48 F. Supp. 490, 495 (S.D.N.Y. 1942). Clearly, the case could not be settled without court approval unless the petitions for a writ of certiorari were withdrawn, in which event the judgment of the court of appeals would become final, and the claims of all members of Subclass B would be extinguished. Thus nothing would remain to be settled, unless some additional agreement to the contrary had been reached, which likewise would have circumvented Rule 23(e).

nance of the status quo is the judicial recognition that the parties to the controversy are free to settle their differences prior to the issuance of the mandate."

Although the law favors settlements as a general matter, that preference is nowhere stronger than it is under Title VII, where "[c]ooperation and voluntary compliance were selected [by Congress] as the preferred means for achieving [its] goal." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1977). Accord, *Carson* v. *American Brands, Inc.*, No. 79-1236 (Feb. 25, 1981), slip op. 8 & n.14. In these circumstances, the district court had jurisdiction to approve the settlement.

III. A COURT MAY APPROVE A SETTLEMENT WHICH AWARDS RIGHTFUL PLACE SENIORITY TO THE PLAINTIFF CLASS WITHOUT UNION CONSENT IN CIRCUMSTANCES SUCH AS THESE

The questions presented by IFFA (Pet. i) are syntactically complex and contain numerous factual assumptions, not all of which are valid.[26] In these circumstances, we believe that the question fairly presented for review is whether, in a Title VII case, a court may approve a settlement reached by a defendant-employer and the plaintiff class, where the settlement includes the restoration of rightful place seniority, and a union representing incumbent employees, which is not a defendant, has inter-

[26] IFFA's first question (Pet. i), for instance, depends entirely upon the premise that the district court lacked subject matter jurisdiction because the charge-filing period is "jurisdictional," a premise that we have shown to be incorrect. Likewise, IFFA uses the term "finding" in a somewhat unusual manner in the second question because the courts below had found that TWA's "no motherhood" policy constituted unlawful discrimination, and the issue remaining at the time of settlement was only whether the claims of some of the plaintiff class members who suffered because of the policy were barred. Finally, IFFA characterizes the settlement as "superseding" the collective bargaining agreement, presumably because the settlement restores the class members to their "rightful place" by "slotting" them into the seniority system. However, the settlement did not "supersede," or even modify, the terms of the agreement.

vened for the purpose of arguing that such relief will unfairly affect incumbents.

IFFA contends (Br. 24-27) that a settlement may not affect seniority "rights" of incumbent employees unless it is approved by the incumbents' collective bargaining representative as well as by the court. By investing the union with such a veto power, this argument clearly gives priority to the incumbents' seniority interests over the interests that Congress sought to protect when it enacted Title VII—to "make persons whole for injuries suffered on account of unlawful employment discrimination" (*Albemarle Paper Co.* v. *Moody*, 422 U.S. 407, 418 (1975)), and to do so where possible through negotiation and voluntary settlement rather than protracted litigation. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

This Court made clear in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), that the federal courts, in fashioning a remedy for employment discrimination, may affect the seniority interests of incumbent employees. Although seniority interests are important, they may not stand in the way of effectuating the important national policy that Congress established in Title VII. As the Court said (*id.* at 778), "[c]ertainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract. This Court has long held that employee expectations arising from a seniority system may be modified by statutes furthering a strong public policy interest."

In *Franks*, of course, seniority relief was ordered only after the courts had found that the employer's practices violated Title VII.[27] IFFA gives too much emphasis to

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[27] In *Franks*, both the union-defendant and the employer were held liable because their collective bargaining agreement perpetuated past discrimination, but this Court's holding that relief could affect the seniority of incumbents did not depend on the finding of union liability. Moreover, in *Teamsters* v. *United States*, 431 U.S.

the particular facts of *Franks*, however, in suggesting (Br. 27-28) that the Court's holding there, that it would be appropriate to grant seniority relief based on a final determination of discrimination, carries the implication that such relief is not appropriate absent such a final determination. The Court's opinion in *Franks* provides no basis for drawing that inference. In *Franks*, the Court rejected the view that seniority rights are "indefeasibly vested," holding that they may be modified where they conflict with the "strong public policy interest" served by Title VII (424 U.S. at 778). There is no compelling ground for maintaining that a court, which can modify seniority rights by "slotting in" victims of discrimination after full litigation, cannot approve a settlement reasonably designed to accomplish the same result. Indeed, to hold otherwise would be to ignore Congress' intent to make voluntary conciliation and settlement "the preferred means" for resolving allegations of employment discrimination under Title VII. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 44.[28]

IFFA's contention, that a settlement may not provide for the restoration of seniority without the approval of a

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324, 348-356 (1977), this Court held that retroactive seniority relief is an appropriate remedy for discrimination by an employer even where the seniority system is bona fide and the union has not violated the Act.

[28] Accord, *Carson* v. *American Brands, Inc.*, *supra*, slip op. 8 n.14 ("In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims"); *United Airlines, Inc.* v. *McDonald*, *supra*, 432 U.S. at 401 (Powell, J., dissenting) ("Settlements particularly serve the public interest 'within the confines of Title VII where "there is a great emphasis . . . on private settlement and the elimination of unfair practices without litigation."' *Air Lines Stewards* v. *American Airlines, Inc.*, 455 F.2d 101, 109 (CA 7 1972), quoting *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 498 (CA 5 1968)"); *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement * * *. In a Title VII case, * * * the policy favoring settlement is even stronger in view of the emphasis placed upon voluntary conciliation by the Act itself").

union that is not a defendant, and thus has no potential liability (see *Northwest Airlines, Inc.* v. *Transport Workers*, No. 79-1056 (Apr. 20, 1981)), is both extravagant and flatly inconsistent with Congress' intent. Settlements are reached only when the parties to litigation recognize that their self-interests will be served by compromise. It is self-evident, however, that the interests of a union that faces no possible liability will seldom, if ever, be advanced by agreeing that seniority should be restored to victims of discrimination, who have been terminated for unlawful reasons and who may well be nonunion members,[29] because such relief will necessarily displace the rights of incumbents to some extent, however insignificantly. Unions exist, of course, to advance the interests of their members. Where, as here, a union faces no prospect of liability, and is not therefore subject to countervailing influences, the union's course of action will be dictated by its members' interests. For Title VII plaintiffs to secure seniority relief, they could be required under IFFA's theory to litigate to the bitter end even the most patently meritorious claims. Moreover, even if the proposed seniority relief would have a de minimis impact on incumbents, a union in these circumstances could still withhold agreement and force the parties to litigate to a final judgment on the merits.[30]

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[29] The union may, of course, stand in a different position with respect to employees who are union members and have suffered discrimination in terms and conditions of continuing employment, as opposed to persons who have suffered discrimination through termination or refusal to hire.

[30] Even under IFFA's theory, of course, plaintiffs and employers could settle a case if the settlement did not include the restoration of seniority. However, this Court has previously noted the critical role that seniority plays in the employment relationship, as well as its importance in providing relief from the effects of employment discrimination. See *Teamsters* v. *United States*, *supra*, 431 U.S. at 364-365; *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 766. IFFA's position, if adopted by this Court, would severely discourage plaintiffs from settling Title VII actions.

IFFA finds support (Br. 24-25) in *High* v. *Braniff Airways, Inc.*, 592 F.2d 1330 (5th Cir. 1979), for its view that settlements of this

Seniority is important, of course, to incumbents as well as to victims of discrimination.[31] However, that fact does not warrant recognition of a union veto power because the interests of incumbents are adequately protected by having the opportunity to present evidence to the settlement court, which must determine that the settlement is fair. Courts do not determine the merits of cases at settlement (*Carson* v. *American Brands, Inc.*, *supra*, slip op. 9 n.14; *Florida Trailer & Equipment Co.* v. *Deal*, 284 F.2d 567, 571-573 (5th Cir. 1960)), but a court must determine that the settlement is fundamentally fair to all parties who may be affected by it. As this Court stated in *Carson*, "[c]ourts judge the fairness of a proposed com-

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type may not be approved over union objection. The cases are not analogous, however, because the posture of the union in *High* was far different from that of IFFA here. While IFFA intervened in this case only when the parties were ready to enter into a settlement, the union in *High* was a named defendant, and thus potentially subject to liability (*id.* at 1332). Moreover, in *High*, the union signed the original consent decree, but objected to a modification that the district court nonetheless approved. Thus, the court of appeals held that the modified decree was not one to which all parties to the litigation had agreed. By contrast, the agreement here was one which was concurred in by all parties to the litigation who had claims for relief or were subject to potential liability. Likewise, the court of appeals held in *High* that the remedial award embodied in the modification could not be imposed upon the union because the record supplied no basis for selecting those persons who were to receive relief under the modification. Here, unquestionably, the beneficiaries of the relief are persons who suffered because of TWA's discriminatory policy, and the relief merely restores them to the places they would have held but for the discrimination.

[31] Inasmuch as employers must regularly deal with their employees' collective bargaining representative, and will be sensitive to employee morale for reasons of self-interest, it is unlikely that employers will thoughtlessly bargain away seniority rights simply to settle litigation, as IFFA suggests. Moreover, the present case presents only the question of the propriety of approving a settlement that provides for rightful place seniority within the scheme of the existing collective bargaining agreement. No abrogation of rights under that agreement is involved.

promise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement" (slip op. 9 n.14). See also *Protective Committee* v. *Anderson*, 390 U.S. 414 (1968). This inquiry is designed not only to determine whether the proposed settlement is fair to class members who did not take part in developing the decree (see Fed. R. Civ. P. 23(e)), but also to permit the court to determine whether the decree fairly treats nonparties who also may be affected. See, *e.g.*, *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980); *Florida Trailer & Equipment Co.* v. *Deal*, *supra*, 284 F.2d at 573.

In Title VII litigation, the fairness hearing insures that a proposed consent decree, which restores seniority to members of the plaintiff class, will affect incumbents in only a fair and reasonable manner. Ordinarily, as here, the relief should preserve the established scheme of seniority rights and merely slot the victims of the alleged discrimination into their rightful place in that scheme.[32] The court's inquiry into the strength of the plaintiffs' case insures that the incumbents' seniority will be affected only when the plaintiffs' claims present a real prospect that full litigation would substantiate the alleged violation of Title VII.

At least two courts of appeals have held in similar circumstances, where the union has intervened only at the time of settlement, that an appropriate inquiry at the fairness hearing will adequately protect the interests of incumbents. In *Moore* v. *City of San Jose*, 615 F.2d 1265 (9th Cir. 1980), and *EEOC* v. *American Telephone & Telegraph Co.*, 419 F. Supp. 1022 (E.D. Pa. 1976), aff'd,

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[32] Here, each former employee received the seniority that she would have had but for TWA's implementation of its "no motherhood" policy (IFFA Pet. App. 21a). This Court has previously held that retroactive seniority such as this—"rightful place" relief—should "ordinarily" be awarded as an element of Title VII relief. See *Teamsters* v. *United States*, *supra*, 431 U.S. at 365; *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 772-773.

556 F.2d 167 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978), the courts, over union objections, approved settlements that provided seniority relief similar to that at issue here. In each case, the court examined the practices that were alleged to violate Title VII and found that the record evidence showed an apparent history of discrimination. In *Moore*, the court of appeals rejected the union's argument that the lower court's findings were insufficient to support relief affecting incumbents, stating (615 F.2d at 1271):

> The sole question before the district court in reviewing a settlement agreement is whether the agreement is fundamentally fair or just. * * * The inquiry of the district court should focus on the terms of the settlement, considering the merits only insofar as they are relevant in determining the probable outcome of the litigation, and thus give some indication of the fairness and justice of the settlement.
>
> Unless we can say that the district court abused its discretion in approving the Agreement, we will not overturn the district court's judgment. The findings of the district court were adequate to support a belief that were the matter fully litigated it is probable that plaintiffs would prevail and relief would be appropriate.

Here, the district court and the court of appeals followed these principles in approving the settlement.[33] The

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[33] IFFA contends (Br. 33) that the result below "is directly opposed" to *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977), cert. dismissed, 434 U.S. 801 (1978). In *Myers*, however, the unions were named as defendants from the outset, and their practices, as well as those of the employer, were alleged to be discriminatory (544 F.2d at 845). The consent decree that the plaintiffs and the employer independently negotiated altered "and superseded" provisions of the collective bargaining agreement, and the court of appeals held that the district court could not make "wholesale revisions" to a seniority system absent a finding that the agreement violated Title VII (*id.* at 855). However, the court of appeals specifically approved, despite the absence of union consent, one modification that was designed merely to achieve "rightful place" for the plaintiffs (*id.* at 858). Because

courts below had already determined that the plaintiffs' complaint had merit. Indeed, the district court had already granted summary judgment on liability, and that holding had been affirmed. In addition, the claims of Subclass A were unquestionably timely, and the claims of Subclass B were strengthened by the fact that the courts of appeals were divided, at the time of settlement, on the "jurisdictional" issue that the court of appeals had previously resolved against the plaintiffs, but which has not yet been resolved finally. See IFAA Pet. App. 7a-8a.[34]

Because the incumbent employees represented by IFFA are not entitled under the law to exclude victims of discrimination from being afforded their rightful place in the seniority scheme, IFFA should not be allowed to veto a settlement agreement reasonably designed to accomplish that result. IFFA was properly afforded a hearing on its objections, but it is for the court rather than IFFA itself to pass judgment on those objections.

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the theory upon which that relief was granted, however, was based on the "perpetuation" theory that this Court rejected in *Teamsters* v. *United States*, *supra*, the court of appeals (*Myers* v. *Gilman Paper Corp.*, 556 F.2d 758 (5th Cir. 1977)) later vacated this decision in light of *Teamsters*. Nonetheless, the relief that the court of appeals had previously approved in *Myers* is clearly consistent with the decisions below.

[34] The thrust of IFFA's argument (Br. 18-37) is that a court may never approve a settlement that affects seniority rights without the union's consent. Assuming both that the district court had jurisdiction and that the fairness hearing is a sufficient vehicle for protecting the incumbents' interests in circumstances such as those presented here, IFFA apparently has no other challenge to make. IFFA does not contest the court's determination of the overall fairness of the settlement, and, at all events, such a challenge would appear to be within the third question presented in IFFA's petition, with respect to which the Court has dismissed the writ as improvidently granted.

CONCLUSION

The judgment of the court of appeals should be affirmed in No. 80-951, and the judgment of the court of appeals should be reversed in No. 78-1545.

Respectfully submitted.

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